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Report on Execution Against Securities

LAW REFORM
COMMISSION OF
BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION
OF BRITISH COLUMBIA

REPORT ON
EXECUTION AGAINST SECURITIES

LRC 116

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TO THE HONOURABLE RUSSELL G. FRASER
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON EXECUTION AGAINST SECURITIES

This Report is concerned with the procedures available for the seizure and sale of securities in order to satisfy a judgment against the owner. The existing provisions of the *Court Order Enforcement Act* governing the seizure of shares and debt instruments are very antiquated and no longer give judgment creditors an adequate remedy against these forms of property. They do not address newer methods of dealing with securities in financial markets. The reforms brought about by the enactment of the *Personal Property Security Act* in 1989 have also made more urgent the need to rationalize procedures for the enforcement of judgments. The Report recommends amendments to the *Court Order Enforcement Act* which are designed to provide a modern and comprehensive framework for execution against securities.

CHAPTER I INTRODUCTION

A. General

In earlier times, wealth consisted principally of land or of tangible, movable assets. The procedures which the law made available for the enforcement of an unpaid judgment through the seizure and sale of the judgment debtor's property reflected that economic reality. While society was still predominantly agricultural and land-based, intangible rights and obligations were not generally considered to be "property" in the same light as land and goods.

When trade began to rival agriculture as the foundation of the economy, a greater proportion of an individual's wealth was likely to be concentrated in intangible things, such as the shares of joint stock companies. The developing commercial civilization required increased pooling of capital and greater flexibility in financing techniques. Concepts of partial rights in property, both tangible and intangible, therefore became more refined.

The law relating to the seizure and sale of property in order to satisfy a judgment, or "execution," was still geared to the older forms of property and it proved to be an inadequate tool to reach the newer ones. At the beginning of the last century, so far as execution against property other than land was concerned, the principal creditor's remedy was the writ of *fieri facias*, an ancestor to the writ of seizure and sale used today. This writ had, historically, been used for the seizure and sale of tangible goods wholly owned by the judgment debtor.[1] The courts refused to extend its reach to the new kinds of property which were coming to be recognized. In some instances remedies were shaped by the courts of equity, but these remedies were often complex, expensive and uncertain. It came to be accepted that legislative change was necessary both to widen the scope of the old writ of *fieri facias* where appropriate and to create new remedies.

In England, the legislative response to this need was the *Judgments Act*[2] of 1838. It introduced two great reforms. First, the reach of the writ of *fieri facias* was extended so that various kinds of intangible wealth which were embodied in a document, such as money or a promissory note, could be seized under that process. Second, it created a new statutory remedy against certain types of property which were then regarded as purely intangible wealth, including shares in a company. This new remedy was the charging order.

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[1] Dunlop, *Creditor-Debtor Law in Canada* (1981) 149.

[2] 1 & 2 Vict., c. 110.

The tools contained in the *Judgments Act, 1838* appear to be part of the present law of British Columbia, although they have been overtaken in practice by the extension of the writ of seizure and sale to shares. This procedure emerged shortly before the turn of the century in British Columbia, but originated in legislation of Upper Canada in 1832 which made shares liable to seizure and sale by the sheriff "in the same manner as other personal property."[3]

The present British Columbia legislation concerning execution against shares has remained largely unchanged since its enactment in 1897.[4] It has been interpreted in only a few cases, but calls for reform have been relatively frequent. In a 1973 case a justice of the Supreme Court observed:[5]

> There is no question in my mind that the legislation should be amended to provide the Sheriff and all interested parties with a clear and simple code for execution against shares in incorporated companies.

The theme was repeated in another judgment in 1984.[6]

Clarity and simplicity are elusive goals in altering the law in relation to a kind of property which, by its nature, tends to be surrounded by a variety of competing interests. These latter are generally antagonistic to the interests of the judgment creditor. A judgment debtor should not be able to insulate wealth from creditors by concentrating it in a closely-held corporation, yet the legitimate interests of other shareholders in maintaining control over the internal arrangements within a small corporation should not be ignored. The judgment debtor's assets should not be sold for less than they are worth, but it is often difficult to determine a value for shares in a private company. The sheriff must not be required to carry out tasks he cannot reasonably be expected to perform, such as playing the role of a stockbroker. Third parties should not be exposed to financial loss where it can be prevented, but concern for the position of third parties should not make execution futile. Finding the necessary equilibrium is a daunting task.

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[3] *An Act to provide for making Stock held in Companies having a joint transferable Stock, liable to the satisfaction of debts*, 2 Will. IV, c. 6. The Act also stated that it would be "lawful" for the company to register the purchaser from the sheriff as the holder of the shares on production of the sheriff's certificate naming the purchaser, and for the purchaser to receive all dividends arising after registration.

[4] *Execution Act*, R.S.B.C. 1897, c. 72.

[5] *O'Hara* v. *Fox*, [1973] B.C.D. Civ., sub-heading "Execution Act."

[6] *R. in Right of British Columbia* v. *Yu*, [1984] 6 W.W.R. 13, 20, 55 B.C.L.R. 329, 335 (S.C.).

B. The Working Paper

For many years, the Law Reform Commission's program has included a project aimed at improving the law of execution against securities. In 1987, a Working Paper[7] was issued which set out proposed amendments to the *Court Order Enforcement Act*.[8] The object of the amendments was to provide an effective remedy against shares for judgment creditors, while also accommodating the competing interests of secured creditors and other third parties. In preparing the Working Paper, the Commission profited greatly from a research paper by Professor Elizabeth Edinger of the Faculty of Law, University of British Columbia, which examined many distinct issues in the law governing execution against shares, and provided some insight into the actual practice within the Sheriff's Office.

C. Consultation

Responses to the Working Paper were received from representatives of the Bar, the securities industry and the financial sector. A fruitful meeting was held with representatives of the Vancouver Stock Exchange, the West Canada Depository Trust Company and their legal advisers in the course of preparing this Report. The draft legislation contained in this Report was reviewed by counsel practising in the area of securities law.

While it is fair to say that all those who commented on the Working Paper supported reform of this area of the law, the general thrust of the responses was that trends in the securities industry, such as the elimination of paper transfer in trading and the increasing use of uncertificated shares, presented a new array of issues which needed to be addressed.[9] The responses also indicated concern over the financial risk to brokers and others which might arise from the seizure and temporary removal of quantities of securities from the market.

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[7] Law Reform Commission of British Columbia, *Execution Against Shares* (W.P. 55, 1987).
[8] R.S.B.C. 1979, c. 75.

These comments have prompted a revision of the draft amendments to the *Court Order Enforcement Act*[10] with a view towards minimizing risk to third parties, while preserving the ability of execution creditors to reach assets in the form of securities. The amendments proposed in this Report should accommodate modern-day methods of trading and the increasing volume of uncertificated securities.

A further development which influenced this Report was the enactment of the long-awaited *Personal Property Security Act*[11] in British Columbia. The PPSA crystallizes rules concerning the creation of security interests[12] in various types of property, including those commonly referred to as "securities," and establishes priorities between secured and judgment creditors. No significant changes in the law governing execution against securities could be recommended without taking this very important new statute into consideration.

D. Summary

As the commercial significance of intangible forms of property increased, the remedies of judgment creditors became more sophisticated in order to reach the new forms of wealth. The law in this Province governing execution against securities, however, has not developed appreciably since the turn of the century, despite significant changes in capital markets and in ways of doing business.

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[9] The scheme proposed in the Working Paper had emphasized seizure of share certificates as the principal means of carrying out execution against shares, in keeping with the widely imitated *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and its treatment of security certificates as virtual negotiable instruments. (*See especially* s. 74.)

[10] *Supra*, n. 8.

[11] S.B.C. 1989, c. 36, as amended, referred to in this Report as the "PPSA." *See also* Law Reform Commission of British Columbia, *Personal Property Security* (LRC 23, 1975).

[12] For the purposes of this Report, a "security interest" is an interest in personal property securing the payment or performance of an obligation. The term is derived from the PPSA, *supra*, n. 11, s. 1(1). A lender may give a loan on the strength of a security interest granted by a borrower in certain items of personal property. If the borrower fails to repay the loan, the security interest usually entitles the lender (or "secured party") to seize and sell the items of property in order to recover the debt. In this Report, we follow the PPSA in calling property that is subject to a security interest the "collateral." As it is possible to have a "security interest" in a "security," however, an unfortunate confusion of terminology is created, which we will avoid by referring to such a security interest as a "pledge" of securities. *See also infra*, Chapter II, n. 68 regarding the use of the term "pledge."

The next Chapter reviews the current law, beginning with the relevant sections of the *Court Order Enforcement Act.*[13] Chapter III explains the recommendations for changes in the law and the rationale for them. It is followed by the draft legislation amending the *Court Order Enforcement Act.*

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[13] *Supra*, n. 8.

CHAPTER II

THE CURRENT LAW

A. General

More than one procedure is available in British Columbia by which a judgment debt can be satisfied from the share holdings of the judgment debtor. Some derive from common law and statute, while others, like receivership, derive from equity.[1] Those which derive from common law and statute are most frequently employed.[2] In this Chapter, as in the rest of the Report, we concentrate on the statutory law of execution.

B. The *Court Order Enforcement Act*, Sections 57-63

The most familiar form of execution against personal property is the procedure in which the judgment creditor obtains a writ of seizure and sale[3] and delivers it to the sheriff.[4] The sheriff takes possession of property belonging to the judgment debtor and sells it to raise money which goes to satisfy the judgment and the sheriff's fees and expenses. In British Columbia the legislation which extends this procedure to shares in a company is found in sections 57 to 63 of the *Court Order Enforcement Act*. The full text of these provisions appears in the Appendix to this Report, but for present purposes, the effect of sections 57 to 63 may be summarized in the following fashion:

> Section 57 provides an archaically worded definition of "corporation."

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[1] The jurisdiction exercised originally by the English Court of Chancery is referred to as "equity." Originally based on the dictates of conscience rather than precedent or legal doctrine, equity came to be a body of jurisprudence in its own right, exercised according to established principles coexisting with those of the common law.

[2] The equitable means of execution usually require post-judgment applications to the court. In theory, they are only available in cases where the property would be subject to execution in the normal manner, but where some impediment makes the normal procedure by way of writ ineffective. The recommendations in this Report are not intended to curtail a court's power to grant equitable execution as that power is currently exercised, and so little will be said about equitable execution beyond noting its existence.

[3] The writ of seizure and sale is one of the writs which the *Court Order Enforcement Act* refers to generically as "writs of execution." The corresponding document used in Small Claims Court proceedings is called an "order for seizure and sale." The Supreme Court terminology is used throughout this Report.

[4] In British Columbia the sheriff's duties in connection with the enforcement of a writ of seizure and sale are often performed by a court bailiff acting under contract. S. 2.1 of the *Sheriff Act*, R.S.B.C. 1979, c. 386 provides for the appointment of court bailiffs. The form of the writ of seizure and sale nevertheless remains a direction to the sheriff and the sheriff is still the nominal protagonist in the execution process. In this Report any references to "the sheriff" include a court bailiff carrying out a writ of execution.

Section 58 provides that all stocks, shares and dividends of a shareholder in a company are liable to be seized and sold under a writ of execution in a similar manner as other personal property.

Section 59 describes the procedure for the seizure and sale of shares. Subsection (1) provides that the sheriff, to whom a writ of execution is directed, shall serve a copy of the writ on the company with a notice that all of the defendant's shares are seized. Subsection (2) provides that from the time of seizure no transfer of the shares by the judgment debtor shall be valid. Subsection (3) makes it clear that a seizure of a share also includes the seizure of all dividends and like benefits which may flow from ownership of the shares.

Section 60 concerns the situation where the company may have more than one office at which service may be validly made. It contemplates that circumstances might arise where the sheriff's notice is served on one company office at the same time as a transferee of the shares from the judgment debtor may seek registration at a different office.

Section 61 provides that shares are deemed to be personal property found in the place where the sheriff's notice is served.

Section 62 provides that where a share is sold under the writ of execution the sheriff shall serve on the company a document certifying the name of the purchaser. It further provides that the company shall enter the sale as a transfer.

Section 63 purports to save all other remedies against shares including any remedy by way of charging order.

1. SECTION 58 AND THE MEANING OF "TRANSFERABLE SHARES"

Section 58 of the *Court Order Enforcement Act* provides:

> **58.** All stock, shares and dividends of shareholders in an incorporated company in the Province, having transferable joint stock or shares, shall be held to be personal property, and are liable to bona fide creditors for debts, and may be attached, seized and sold under writs of execution in a similar manner as other personal property.

The section speaks of "transferable joint stock or shares" and a persistent question has been the meaning which should be attached to the word "transferable." In particular, what is the status of shares which are subject to some sort of limitation on their transfer in the company's incorporation documents, as is often the case in small companies, where the shareholders wish to remain a closed group?[5] Did the legislature intend "transferable" to mean freely transferable, or was it intended that transfer-limited shares should also be exigible?

This issue first arose in Ontario in 1921 in *Re Phillips and La Paloma Sweets Ltd.*,[6] which considered the corresponding provision of the Ontario execution legislation. There it was held that "transferable" meant "freely transferable" and that shares in a "private company," which were subject to transfer limitations were not subject to seizure. For many years it was accepted that *Phillips* also represented the law of British Columbia although it had been suggested that such shares might be amenable to the charging order process.[7]

In 1972 this view was challenged by Anderson J. (as he then was) in *Associates Finance Co.* v. *Webber and Dixon.*[8] He held that the legislature must have intended that all shares be exigible whether they are freely transferable or subject to transfer limitations. In reaching this conclusion Anderson J. stated what he saw as the appropriate policy considerations:[9]

> ...in my view, the modern trend of our jurisprudence is, where possible, to prevent the use of restrictive corporate devices which have the effect of defeating the rights of creditors.

The actual result of the case, however, was not validation of a seizure of shares with transfer restrictions. The decision was, rather, that a charging order under the *Judgments Act* should be refused because shares could be seized by way of a writ.

Twelve years passed before the decision in *Associates Finance* was questioned in litigation.[10] In *Peligren* v. *Ajac's Equip-*

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5. The restriction will often take the form of a requirement that the directors must consent to the registration of any transferee. Another common requirement is that shares must be offered for sale to other shareholders or to holders of the same class of shares before they can be sold to anyone else. Restrictions on transfer are discussed in Chapter III, *infra*.

6. (1921) 51 O.L.R. 125, 66 D.L.R. 577 (H.C.).

7. *See* C.R.B. Dunlop, "Some Aspects of the Charging Order as a Remedy for Unsecured Creditors," (1967) 3 U.B.C. L. Rev. 83.

8. [1972] 4 W.W.R. 131 (B.C.S.C.).

9. *Ibid.*, at 147.

10. But the decision was commented on and criticized: *see* B.V. Slutsky, "Execution Against Private Company Shares," (1972) 30 Adv. 240.

ment (1982) Inc. and Halsall[11] counsel for the defendant made a direct attack on the authoritative status of the earlier case. Stewart L.J.S.C. notes:[12]

> Mr. Horn has pointed out in his submission to persuade me that the above authority is not binding upon me, that the application before Anderson J. was *ex parte*, and that the learned judge's conclusions were reached without the benefit of argument from counsel. Furthermore, he submits that the review of the law carried out by Anderson J. was unnecessary to settle the issue before him, and that his comments with respect to the legislation which I have to consider are accordingly *obiter*.

Conceding that counsel was probably right, Stewart L.J.S.C. nevertheless was unswayed and held that shares with transfer limitations are exigible. To date, the Court of Appeal has not had an opportunity to consider or comment on this issue.

A serious deficiency is the failure of the legislation to provide guidance on the disposition of such shares. A special mode of sale for shares with transfer limitations was suggested by Anderson J. in *Associates Finance*.[13] Having held such shares exigible, he sought some compromise among the rights of the creditor, the rights of the company and the rights of other shareholders of the company. He held that the duty of the sheriff when seizing and selling shares with transfer limitations was to do so "in accordance with the articles of association,"[14] except those articles which absolutely prohibit transfers at the discretion of the directors, by which he is not bound. For example, a provision in the articles that a defined group has a first right to purchase should be observed before throwing the sale open to the public.

More recently, Stewart L.J.S.C. in *Peligren*[15] was not convinced that the sheriff need concern himself at all with the articles of incorporation:[16]

> Mr. Horn has submitted further that if the sheriff is empowered to sell shares of a private company, he must sell them in accordance with the articles of incorporation, and offer them first to the other members, and referred to some comments of Anderson J. which indicated he was of the same view. I do not agree, and simply refer to s. 58 which expressly provides that shares may be sold in a similar manner as other personal property. This does not necessarily mean that the other members of the company cannot

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[11] [1984] 5 W.W.R. 563 (B.C.S.C.).
[12] *Ibid.*, at 566.
[13] *Supra*, n. 8.
[14] *Ibid.*, at 147.
[15] *Supra*, n. 11.
[16] *Ibid.*, at 567.

> preserve their "closed group." They would be aware of the seizure and in a position to bid at the sale, with probably a better idea of value than any stranger, even though handicapped by ignorance of particulars of other bids, if any.

British Columbia, therefore, enjoys inconsistent decisions as to the procedure a sheriff should follow in selling shares with transfer limitations. Publicly traded shares generally pose little difficulty for the sheriff so far as valuation is concerned. The current value can usually be ascertained. On the other hand, valuing shares which are not publicly traded, and which have transfer limitations attached to them, is an extraordinarily complex question. A variety of methods are available for valuing such shares, depending on the purpose of the valuation:[17]

> We shall discuss the problems and issues involved in valuing the stock of a close corporation. I think we will make it perfectly clear, through our own confusion, that valuation of the stock of a closely held company is not an exact science, and that it will be impossible to devise a formula that will be generally applicable to the multitude of different valuation issues arising in estate tax cases. While there are probably hundreds of valuation cases, for the most part they only point up the fact that there are many relevant factors to take into account, that these factors will be of widely varying importance in different cases, and that each case must be decided on the basis of its own facts.

Sale of seized property at a gross undervalue renders the sheriff liable to action. Moreover, general principles of fairness dictate that the debtor should not be stripped of his property with no corresponding satisfaction of the debt. If there is no easy method for determining the value of such shares, how is the sheriff to know whether he has obtained the best available price?

Supreme Court Rule 42(22) authorizes an application to the court by the judgment creditor, the debtor or the sheriff for directions concerning sale.[18] In *A.A.C.R. Enterprises Ltd.* v. *Grimwood*,[19] the judgment creditor applied to court for an order instructing the deputy sheriff to sell certain shares he had seized.

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[17] E.C. Rustigan, C.W. Lentz and H.A. Olsen, *Problems in Valuing Stock of a Close Corporation: A Panel Discussion in Selected Articles on Closely Held Enterprises* (H. Wheeler and R.S. Morse Jr., eds., 1971) 903. *See also* J.A. MacDonald, *Valuation of Private Company Shares, Seminar on Private Companies* (1968) 113; *Cyprus Anvil Mining Corp.* v. *Dickson*, (1984) 54 B.C.L.R. 225 (S.C.).

[18] This procedure was apparently intended to replace the older writ of *venditioni exponas*. This writ authorized the sheriff to sell property taken in execution for whatever price he could get even though that price might otherwise be regarded as unreasonably low. S. 42 of the *Court Order Enforcement Act* still defines a writ of execution as including "any subsequent writ that may give effect to it" and a writ of *venditioni exponas* is just such a subsequent writ. Rule 1 of the *Supreme Court Rules* does not contain such an expanded definition. The inference must be that the writ of *venditioni exponas* has now been replaced.

[19] (1984) 51 B.C.L.R. 13 (S.C.).

Two offers had been received by the sheriff. The wife of the judgment creditor bid $2001 for all 199 Class A Shares and the brother of the defendant bid $1050 for one share. The sheriff had adjourned the sale, presumably because he considered the bids to be inadequate.

Meredith J. refused to order the sheriff to sell:[20]

> I think that the provisions of the *Court Order Enforcement Act* as to seizure and sale of company shares are largely unworkable in the case of attempted execution against partial interests in unlisted companies. This is because in most, if not all, cases there will be no independent market for the shares, aside from creditors. Whatever value may be deduced from the cash flow of a company or from the book value of the shares, few buyers would be willing to purchase from an unwilling vendor the prospect of litigation with a hostile partner. If the vendor and partner were willing and cooperative, then the shares could be listed for sale so as to achieve the best price. That is not the case here.
>
> But a creditor or creditors of the debtor shareholder may well wish to step into the shoes of the shareholder. They might even be willing to buy the shares for all or a portion of the debt. Here, for example, the creditor in effect wants to buy for a nominal sum shares the defendant claims are worth a vastly greater amount. A sale to a creditor might conceivably be appropriate if all other creditors were made aware of the auction. In this case, other creditors exist. They have not been identified and thus they have not been given notice. No one knows what the "best available price" might be. Thus it is that in my view the appropriate course that a creditor might take is to invoke the *Bankruptcy Act*, R.S.C. 1970, c. B-3. In this way, the creditors would be identified so that a disposition of the shares might be made to the best advantage of all.

It should be noted that to invoke the *Bankruptcy Act*[21] as suggested by Meredith J. would not solve the valuation problem. It would merely shift the responsibility from the sheriff to the trustee in bankruptcy.

The assertion of Meredith J. in *A.A.C.R. Enterprises* that the provisions of the *Court Order Enforcement Act* are unworkable is something of an overstatement. Shares with transfer restrictions are seized and sold. The question that must be answered is whether their operation is effective in terms of satisfying debts or whether it is merely punitive to the judgment debtor, the corporation and to its other shareholders. Both *Peligren*[22] and *Associates Finance*[23] assert that under section 62 of the *Court Order Enforcement Act* the purchaser of shares at an execution sale is entitled to be registered as the new shareholder. Such an interpretation sits uneasily with the fundamental principle of debtor-creditor law that the creditor can assert no higher rights than the judgment debtor.[24] This interpretation is, however, consistent with the legislation and is justifiable on the basis that the right to maintain a closed group is a privilege granted by the legislature under the condition that shares in such a corporation are subject to the *Court Order Enforcement Act*.

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[20] *Ibid.*, at 15.
[21] R.S.C. 1985, c. B-3.
[22] *Supra*, n. 11.
[23] *Supra*, n. 8.

2. PARTIAL INTERESTS IN SHARES

At common law, the writ of *fieri facias* reached only legal interests in tangible goods and chattels. Equity stepped in to aid the judgment creditor when execution at common law was not possible because the interest of the judgment debtor was merely beneficial or equitable.

By statute, the equity of redemption and equitable interests in tangible goods and chattels have been brought within the scope of execution at law. Section 56 of the *Court Order Enforcement Act* provides:

> **56.** Under a writ of execution against goods the sheriff, or other officer to whom it is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the execution debtor, and the sale shall convey whatever interest the execution debtor had in the goods and chattels at the time of the seizure.

Section 49 provides:

> **49.** Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

Whether the combined effect of these provisions renders partial interests in shares exigible under a writ of seizure and sale has never been directly decided although a few cases provide indirect support for that view.

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[24] This is not an isolated departure from that general principle. See, *e.g.*, *Re Nishi Industries Ltd.*, (1978) 91 D.L.R. (3d) 321, [1978] 6 W.W.R. 736 (B.C.C.A.); *Royal Bank of Canada* v. *First Pioneer Investments*, [1984] 2 S.C.R. 125, 12 D.L.R. (4th) 1; *Dyal Singh* v. *Kenyan Insurance Co.*, [1954] A.C. 287, [1954] 1 All E.R. 847 (P.C.).

(a) Equitable Interests

The cases which, by inference, have held an equitable interest in shares to be exigible did not actually validate execution by writ. In *Gould* v. *Ablitt*,[25] the judgment creditor applied for a charging order under the *Judgments Acts, 1838 and 1840*. The shares in question were registered in the name of the wife of the judgment debtor and the applicant contended that she was merely the bare trustee. The charging order was refused because the applicant had failed to establish beneficial ownership in the judgment debtor. At no point did MacFarlane J. state that such interest could be reached by a writ.[26]

In the second case, *Vancouver A&W Drive-Ins Ltd.* v. *United Food Services Ltd.*[27] the availability of execution by writ against an equitable interest in shares was directly commented on. The case involved an attempt to proceed against shares which were part of a self-directed Registered Retirement Savings Plan (R.R.S.P.)[28] fund. The judgment debtor was the beneficial owner of the fund.

Fulton J. was prepared to give a broad meaning to "effects" as used in section 49:[29]

> I would be inclined to hold that the word "effects" has a sufficiently broad meaning to cover the interest here. In Black's Law Dictionary, 5th ed. (1979), p. 462, the following definition appears:
>
> > Effects. Personal estate or property; though the term may include both real and personal property.
>
> Clearly a beneficial interest in such a fund and in the investments and money comprising it, is personal property. On the face of it, then, the interest of the judgment debtor in the shares forming part of the fund is property and the shares should be subject to seizure and sale under a writ of execution.

Those observations, however, remain *obiter dicta*. Fulton J. saw other objections to proceeding against the shares by means of the writ and ultimately permitted the creditor to reach the fund through the appointment of a receiver. If this revised interpretation of section 49 is correct, then the issue is settled. Unfortunately, Fulton J. gave no consideration to past authority on the scope of section 49 and seemed to accept the argument of counsel that British Columbia lacks statutory authority extending execution by writ to equitable interests. Section 56 appears to have been totally overlooked.

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[25] (1958) 26 W.W.R. 274 (B.C.S.C.).

[26] The inference arises because he maintains the position he had taken earlier, in *Annett and Annett* v. *Randall*, (B.C.S.C. 1952, Victoria Registry, unreported), that where execution by writ is available, a charging order should be refused.

[27] (1981) 38 B.C.L.R. 30.

[28] An R.R.S.P. is a tax deferment device permitted under the federal income tax law.

[29] *Supra*, n. 27 at 39.

(b) *Equity of Redemption*

The exigibility of a judgment debtor's equity of redemption in shares suffers from an equal poverty of direct authority.

In *Annett*,[30] the judgment creditor sought a charging order against the debtor's equity of redemption in certain shares. MacFarlane J. refused the order because the shares were exigible under the *Execution Act*. In *Re Patmore*,[31] the debtor had deposited his share certificates with a bank as security for his indebtedness. Sullivan J. stated that:[32]

> ...the shares in question, or the equity of Dr. Patmore in them, are exigible under execution in this province and might have been seized by the sheriff in execution of a writ of *fieri facias*....

The weakness of *Patmore* is that the shares, being in "street form,"[33] were held by the court to be exigible as "money" or "banknotes" under what is now section 52 of the *Court Order Enforcement Act* and thus were liable to seizure on a different basis.

3. SHARES IN FOREIGN CORPORATIONS

Confusion surrounds the exigibility of shares in foreign corporations under a writ of seizure and sale. Two decisions of the British Columbia Supreme Court have reached opposite results. In the second case no mention was made of the first. Neither case deals adequately with the legislation.

Re Patmore[34] concerned shares in "street form" in a Delaware company. Sullivan J. held that it is irrelevant whether such shares are in a domestic or a foreign corporation because the certificates are the equivalent of money and so can be seized under section 52 of the *Court Order Enforcement Act* which authorizes seizure of money and securities for money. No comment was made on any of the more specific provisions of the Act relating to shares, or whether shares in foreign corporations which are not in "street" form are also exigible.

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[30] *Supra*, n. 26.

[31] (1962) 39 W.W.R. 460 (B.C.S.C.).

[32] *Ibid.*, at 462.

[33] By "street form" we take it to mean that while the shares were registered in the name of a designated individual, that individual had properly endorsed the share certificates in blank for transfer to an undesignated transferee. In this form they have the same negotiable quality as "bearer" shares which are not made out in the name of any particular individual. The terms "street shares" and "bearer shares" are frequently used interchangeably.

[34] *Supra*, n. 31.

Vancouver A&W Drive-Ins,[35] on the other hand, attempted to resolve the question purely from an examination of the Act, particularly section 58:

> **58.** All stock, shares and dividends of share holders in an incorporated company in the Province, having transferable joint stock or shares, shall be held to be personal property, and are liable to bona fide creditors for debts, and may be attached, seized and sold under writs of execution in a similar manner as other personal property.

The difficulty with section 58 is that it contains a classic example of a dangling modifier. The phrase "in the Province" could refer to the company, it could refer to the shares or it could refer to both. Any interpretation raises further questions. If it refers to shares, when is a share considered to be "in the Province"? If to the company, when is a company "in the Province"?

Fulton J. concluded that only one interpretation of section 58 is possible: shares subject to execution by writ are limited to those of companies incorporated in the Province. This reading is much narrower than is necessary. At common law a company is generally considered to be present in a jurisdiction whenever it carries on business there.[36] The place of incorporation is irrelevant. Thus, requiring the company to be in the Province is not the same as requiring the company to be incorporated in the Province.

The case, moreover, is inconsistent with decisions in Ontario concerning virtually identical legislation. Both *Malouf* v. *Labad*[37] and *Herold* v. *Budding*[38] held that shares in foreign corporations were exigible by writ because of the *situs* provision (section 61 in the the *Court Order Enforcement Act*). The statutory *situs* rule provides:

> **61.** The stock or shares in the capital stock shall be held to be personal property, found by the sheriff in the place where notice of the seizure of them is served.

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[35] *Supra*, n. 27.

[36] Dicey and Morris, *The Conflict of Laws* (10th ed., 1980) 186-189.

[37] (1912) 3 D.L.R. 755 (Ont. Div. Ct.).

[38] (1916) 37 O.L.R. 605 (H.C.).

4. ENTITLEMENT TO DIVIDENDS AND BONUSES

Section 59(3) of the *Court Order Enforcement Act* concerns dividends and like benefits associated with shares. It provides:

> **59.** (3) Every seizure and sale made under it shall include all dividends, premiums, bonuses or other pecuniary profits on the stock or shares seized, and they shall not, after notice, be paid by the company to anyone except the person to whom the stock or shares have been sold by the sheriff, unless the seizure is discharged, on penalty of paying it twice.

This provision has two limbs, the first of which provides that the seizure and sale of shares includes "all dividends, premiums, bonuses or other pecuniary profits on the stock or shares seized." Such a provision is exactly what one might expect. Anything else would be inexplicable.

The second limb of the provision prohibits payment, by the corporation, of these dividends and profits to anyone other than the purchaser "after notice." The penalty for breach is the liability to pay again. The effect of this limb is not so clear because no definition of notice is given. There are two possibilities: notice of seizure and notice of sale. Earlier versions of the Act made it clear that notice of seizure was contemplated through using the phrase "notice as aforesaid," a reference back to section 59(1).

One might also question the policy of the provision insofar as it calls for payment of the dividends and bonuses to the purchaser from the sheriff rather than to the sheriff himself. On the seizure of property under the authority of a writ, the sheriff acquires a special property in the goods, the general property remaining in the judgment debtor. The sheriff is seizing on behalf of the judgment creditor who has delivered the writ for execution. If the sheriff is empowered to seize the payments to which the shareholder is entitled it is arguable that he should do so for the benefit of the judgment creditor and not an as yet unascertained purchaser. The purchaser would, of course, be entitled to any dividends declared or made after the sale to him.[39]

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[39] No case has been found which comments on this provision, but support for the interpretation suggested above can be found in *Herold*, *supra*, n. 38, where a receiver was appointed "to obtain income pending sale" of shares under a writ of *fieri facias* which the judgment creditor had not yet issued. Section 98(2) of the *Court Order Enforcement Act* contains a very similar conundrum: *(cont....)*

5. METHOD OF SEIZURE

(a) Statutory Authority

As mentioned above, two methods by which shares can be seized under a writ coexist in British Columbia. Service of notice on the issuing corporation under section 59(1) of the *Court Order Enforcement Act* is in itself sufficient to complete a seizure.[40] It is also possible to effect a seizure by seizing the certificates representing the shares.[41]

While both methods are permitted, the statutory basis on which a physical seizure of certificates is authorized is somewhat unclear. In *Re Patmore*[42] it was said to be the fact that the certificates were in street form and could therefore be seized like money or banknotes under the equivalent of section 52 then in force. In *O'Hara*[43] the governing provision was said to be section 58, making shares exigible "in the same manner as other personal property." The certificate representing the underlying intangible right of property in the share was thus capable of being seized like other documents of title. While *R. in Right of B.C.* v. *Yu*[44] appeared to clarify that seizure by notice and seizure of the share certificate were both valid, it did not resolve the question as to which provision governed the latter method of seizure. It is also unclear whether share certificates not in bearer or street form can be seized.

The distinction between seizure under section 52 and section 58 is not without significance, as section 52 appears to require the sheriff to deliver money and other liquid property

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39. *(...cont.)*

> **98.** (2) Notwithstanding subsection (1) [which vests in the purchaser the interest of the judgment debtor as of the time of registration of the judgment and all intervening times until sale, discharged from the first registered judgment and all other subsequent charges] where the execution debtor's interest in the land sold under this Part is that of a mortgagee or a vendor under an agreement to sell the land, the conveyance executed by the sheriff under subsection (1) vests in the purchaser no right to payment of any money paid by or on behalf of the mortgagor or the purchaser under the agreement to sell the land, as the case may be, prior to receipt of notice of the judgment by the mortgagor or the purchaser or his personal representative.

The subsection is obviously intended to protect the mortgagor or purchaser under an agreement for sale from claims from both the mortgagee/vendor and from the purchaser but the language used is singularly inept. Subsection (3) defines a sufficient notice of judgment but these two subsections are the only ones which mention a notice of judgment. Recommendations for the modernization of this provision have been made. *See* Law Reform Commission of British Columbia, *Report on Execution Against Land* (LRC 40, 1978) 39.

40. *R. in Right of British Columbia* v. *Yu*, (1984) 55 B.C.L.R. 329 (S.C.).

41. *Re Patmore, supra*, n. 31; *O'Hara* v. *Fox*, [1973] B.C. Unrep. Dec., sub-heading "Execution Act" (B.C.S.C., Cranbrook Registry).

42. *Supra*, n. 31.

43. *Supra*, n. 41.

44. *Supra*, n. 40.

seized under it directly to the judgment creditor,[45] rather than treating the proceeds as a "levy" for the purposes of the *Creditor Assistance Act*[46] and holding them for distribution among all judgment creditors filing writs of execution within the time allowed by that Act for sharing in the fund.[47]

(b) Shares Governed by the Canada Business Corporations Act and the Bank Act

The *Canada Business Corporations Act*[48] imposes a requirement that shares of companies incorporated under it can only be seized by obtaining possession of the share certificate.[49] This is also true of banks, whose securities are governed by the *Bank Act*.[50] Since the federal statutes take precedence over the provincial *Court Order Enforcement Act*,[51] no other method of execution is permissible.[52]

(c) Problems With Having Two Methods of Seizure

There is no doubt that the ability to seize a judgment debtor's shares through the service of a notice of seizure on the issuer is a great advantage to the judgment creditor. The speed with which it can be done minimizes the chance that the judgment debtor will be able to delay or hinder the execution process. It avoids the obvious problem of having to locate the share certificates, which can easily be moved or concealed. Yet mischief can result from the fact that an execution may be carried out while the share certificate remains untouched by the process.

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[45] Section 52 of the *Court Order Enforcement Act* provides:

> 52. Any sheriff or other officer to whom any writ of execution is directed shall seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, belonging to the execution debtor, and may and shall pay and deliver to the execution creditor any money or bank notes which are seized, or a sufficient part of it; and shall hold any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money as security for the amount by the writ of execution directed to be levied, or as much of it as has not been otherwise levied and raised; and the sheriff or other officer may sue in his own name for the recovery of the sums secured by it, if and when the time of payment of it has arrived.

[46] R.S.B.C. 1979, c. 80.

[47] Remarks were made by two members of the Court of Appeal in *Adams* v. *Richards*, (1915) 21 B.C.R. 212 (C.A.) to the effect that this was not the meaning of s. 52 (then s. 12 of the *Execution Act*, R.S.B.C. 1911, c. 79, s. 13), but it was not essential to the outcome of the case and the legislation is still far from clear today.

[48] R.S.C. 1985, c. C-44.

[49] *Ibid.*, s. 74. The securities of a CBCA corporation are deemed to be negotiable instruments unless their transferability is subject to restrictions stated on the certificate: s. 48(3).

[50] R.S.C. 1985. c. B-1, s. 101.

[51] R.S.B.C. 1979, c. 75.

[52] The doctrine of paramountcy in constitutional law holds that if valid federal and valid provincial legislation conflict, the federal legislation prevails, rendering the provincial enactment inoperative to the extent of the inconsistency: *see Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161.

Despite recent trends towards certificateless trading, commercial practice still gives considerable importance to share certificates and transactions involving them are common. When endorsed for transfer in blank, share certificates have many of the attributes of negotiable instruments.[53] Delivery of a properly endorsed share certificate, or one endorsed in blank, is a standard means of transferring the underlying shares.[54] A mortgage or pledge of shares and other securities almost always requires a deposit of the certificates endorsed for transfer to enable the secured party to sell them in the event of a default by the borrower. Since a seizure can be carried out without the knowledge of the judgment debtor or other holder of the documents for the time being, the execution process can disrupt reasonable expectations flowing from possession of the certificates.

After a seizure by the notice method, the judgment debtor may use the certificates in an attempt to transfer or mortgage the shares, either innocently due to ignorance of the seizure,[55] or fraudulently. In either case, the transfer or mortgage will be invalid by virtue of section 59(2) of the *Court Order Enforcement Act*, but an innocent purchaser or mortgagee may incur a loss.

A competition may arise between a purchaser from the sheriff and a person who acquired a transfer from the judgment debtor prior to the seizure with properly endorsed certificates, but who did not register the shares in his or her name with the issuing company before notice of seizure was served.

It is difficult to assert with confidence who would win the priority contests described above. The answer may turn on the order of the transfers, the order of application for registration and any real or constructive notice one transferee may have of the other's interest. The body of law respecting priorities among competing transferees in the non-execution context is convoluted[56] and there is little authority which covers the situation where one of the claimants is the transferee of a share seized under a notice procedure.

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[53] *See Solloway* v. *Blumberger*, [1933] S.C.R. 163; *Patrick* v. *Royal Bank of Canada*, [1932] 2 W.W.R. 257 (B.C.C.A.). Securities issued by corporations formed under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 are deemed to be negotiable instruments by s. 48(3) of the Act.

[54] Actually, the legal title is perfected when the issuing corporation registers the transferee as owner of the shares, but the holder of the share certificate has a *prima facie* right to demand registration in the absence of a restriction on transfer: *Colonial Bank* v. *Cady*, (1890) 15 App. Cas. 267 (H.L.); *Secretary of State* v. *Alien Property Custodian*, [1931] S.C.R. 170, 183; *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310, 25 D.L.R. 567 (S.C.); *Melanson v. McCleave*, (1957) 11 D.L.R. (2d) 579 (N.S.S.C.).

[55] *See R. in Right of British Columbia* v. *Yu*, *supra*, n. 40, in which a block of shares was hypothecated as collateral security for a debt and the share certificates turned over in accordance with the pledge when, unknown to the parties, the shares had previously been seized by service of notice on the corporation. The execution took priority over the mortgage.

[56] *See* Gower, *Principles of Modern Company Law* (4th ed., 1979) 455-460.

In the case of publicly traded shares, an entire series of purchases and sales may be invalidated because all parties assumed the availability of the certificates meant the underlying shares were freely transferable. This is a problem which does occur in British Columbia from time to time. It would not arise if the sheriff had to physically seize the certificates to carry out an execution.

While most problems could be avoided if prospective purchasers of shares or secured parties checked for outstanding executions with the issuing corporation and its transfer agent before entering into a transaction, this is rarely done and is not likely to become a standard practice. In the case of transactions on the open exchange, the nature of the market makes searches of this kind a practical impossibility. Given the severe effects that the present law of execution can have on innocent parties, it would clearly be desirable to eliminate these as far as possible through the harmonization of execution procedures with normal business practices.

C. Other Methods of Execution

1. CHARGING ORDERS UNDER THE JUDGMENTS ACTS

Colonization of British Columbia resulted in the adoption of applicable English law as it stood in 1858.[57] The *Judgments Acts 1838*[58] *and 1840*[59] thus form part of the law in force in the Province. The 1838 Act made shares and certain kinds of government securities exigible for the first time in England by means of the charging order, a remedy which the Act also created. The 1840 Act clarified the application of the earlier one, confirming that it extended to non-possessory and contingent rights in shares.

The procedure for obtaining a charging order is a cumbersome one involving an initial application, made without notice to the judgment debtor, for an order restraining the registration of a transfer of the shares or other securities and directing the judgment debtor to show cause why a final charging order should not be made.[60] If the judgment debtor does not convince the court that a charging order should not be made, the order is made absolute, charging the property with the payment of the judgment.[61] If the judgment remains unsatisfied after six months, the judgment creditor can bring an action for sale of the property charged.[62]

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[57] *Law and Equity Act*, R.S.B.C., c. 224, s. 2.
[58] 1 & 2 Vict., c. 110.
[59] 3 & 4 Vict., c. 82.

In two cases, it has been said that a charging order is not obtainable if the shares or the judgment debtor's interest in them can be made exigible by a writ of execution.[63] Since the *Court Order Enforcement Act* contains no provision regarding "government stock, funds or annuities," which the *Judgments Acts* also make exigible, it has been suggested that a charging order is the only means of execution against these types of securities.[64]

2. Appointment Of A Receiver

If the property is subject to execution but the normal methods of execution are ineffective for some reason, a judgment creditor can seek equitable execution, usually in the form of appointment of a receiver. Receivership has been employed in British Columbia to reach interests in shares in a number of instances. In one case, the shares were in an extraprovincial company.[65] In another, appointment of a receiver was sought to allow orderly liquidation of the shares held in an RRSP, thus minimizing the income tax liability which sale of the shares would generate and the reduction in value which would likely occur if the shares were sold in one block.[66]

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[60] *Supra*, n. 58, s. 15.

[61] S. 14 of the 1838 Act states that the order entitles the judgment creditor to "all such Remedies as he would have been entitled to if such Charge had been made in his Favour by the Judgment Debtor." The exact ramifications of this language are not clear. It may not be a true charge for all purposes. For instance, the rule in *Dearle* v. *Hall*, (1828) 3 Russ. 1, 38 E.R. 475 does not apply, so that an assignment made before the order will take priority regardless of earlier notice to the corporation by the judgment creditor obtaining the order: *see In re Leavesley*, [1891] 2 Ch. 1 (C.A.); C.R.B. Dunlop, *supra*, n. 7, 106. Recent authority is to the effect that other types of charging orders do not give secured creditor status for purposes of bankruptcy: *see Re Bonnycastle*, (1987) 16 B.C.L.R. (2d) 220 (S.C.); *Re Bright*, (1981) 124 D.L.R. (3d) 115 (Ont. S.C.); *In re Overseas Engineering (G.B.) Ltd.*, [1963] Ch. 24 (C.A.). It has been held that an equitable charging order attaching funds in court was unaffected by the forerunner of the *Creditor Assistance Act*, however. *See Yick Chong* v. *Hong Sing Co.*, (1932) 46 B.C.R. 290 (S.C.). This would, in effect, give a preference over judgment creditors proceeding by writ of execution.

[62] *Supra.*, n. 58, s. 14.

[63] *Annett* v. *Randall*, *supra*, n. 26; *Gould* v. *Ablitt*, *supra*, n. 25.

[64] Dunlop, *supra*, n. 7, at 91.

[65] *Vancouver A & W Drive-Ins Ltd.* v. *United Food Services Ltd.*, *supra*, n. 27.

[66] *National Trust Co.* v. *United Services Funds, Carter et al.*, [1986] B.C.J. No. 1222 Van. No. C8664336.

D. Mode of Sale

At common law, the obligation of the sheriff is to sell the property seized at the best available price – a price bearing a reasonable relation to the value of the goods. No particular mode of sale is prescribed so long as the required result is achieved. Many legislatures have decided that the mode of sale most likely to obtain the best available price is public auction and so have limited the sheriff to that procedure.[67]

Until 1976, the common law rule was unqualified in British Columbia. The common law rule may, however, have been changed by the *Supreme Court Rules* enacted that year. Form 45, the writ of seizure and sale, directs the sheriff to sell "by public auction or by tender." That phrase is treated, in practice, as a prohibition on private sales.

No doubt on occasion a public auction will be the most appropriate mode to dispose of shares, but the present rule is unclear in its application to shares and, at worst, it may unnecessarily restrict the sheriff in carrying out his duties.

E. Bailees

Securities are very often held by a person other than their beneficial owner. This may arise under many different legal relationships. A lender will often retain possession of securities pledged as collateral for the loan.[68] Sometimes the shares of the principals of a small company will be lodged with the financial backers of the company to ensure that the composition of the controlling group will remain the same. Shares may be held in escrow pending the fulfilment of some precondition for their distribution. Or, security certificates may simply be deposited for the purposes of safekeeping.

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[67] *See* G. Turriff and E. Edinger, *The Office of the Sheriff* (1983), Study Paper for the Law Reform Commission of British Columbia, 162.

[68] The use of the term "pledge" in this Report to refer generally to security interests created in shares and debt obligations is a non-technical one. Strictly speaking, a pledge is a delivery of an item of property to a creditor which the creditor may hold until repayment of an obligation. The creditor obtains no title to the item pledged, and has only a right to sell it in the event of the borrower's default. By contrast, a mortgage transfers ownership to the mortgagee, subject to the borrower's right to redeem the collateral. There is authority for the view that a deposit of share certificates, (which is the usual way of giving effect to an agreement to grant a security interest in shares) creates an equitable mortgage, not a pledge: *Harrold v. Plenty*, [1901] 2 Ch. 314; *Hunter* v. *Zakus*, (1968) 67 D.L.R. (2d) 355 (B.C.S.C.). On the other hand, the deposit of bearer bonds has been held to create a pledge rather than a mortgage: *Carter* v. *Wake*, (1877) 4 Ch. D. 605. The term "pledge" has occasionally been used by the courts in much the same sense as it is used in this Report, however. *See Colonial Bank* v. *Cady*, (1890) 15 App. Cas. 267, 283; *Re M.C. Masonry Ltd.*; *Peat Marwick Ltd.* v. *Goldfarb*, (1983) 44 C.B.R. (N.S.) 174, 178 (Ont. C.A.).

The provisions of the *Court Order Enforcement Act* governing execution against shares do not expressly acknowledge these very common situations. Considerable uncertainty therefore surrounds the proper way for a judgment creditor to proceed when confronted by them, and even whether the securities are exigible at all.

In this Report we refer to a person who holds a security, but who is not its beneficial owner, as a "bailee." This use of the term "bailee" is for the sake of convenience, and is broader than its usual meaning in law.[69] We do not refer to investment dealers holding their clients' securities as "bailees," however, as the issues surrounding the securities industry are dealt with separately in the Report.

F. Securities Under the Control of Investment Dealers

1. THE NATURE OF THE SECURITIES BUSINESS

Perhaps more often than not, a judgment creditor who attempts to carry out an execution against the judgment debtor's securities will find they are in the hands of an investment dealer.[70] Many consequences can flow from the deposit of securities with an investment dealer, depending on the specific purpose of the deposit and the terms of the agreement between the investment dealer and the client governing the basis on which the securities are to be held. Under some circumstances the investment dealer may have advanced funds to enable the purchase of the securities, and will then have a lien which entitles the dealer to withhold them until reimbursement takes place.[71] Under other circumstances, the investment dealer may be a trustee or merely a custodian of the securities for the client. The legal relationships which are created between the client, the investment dealer, and third parties bring a higher order of complexity to the execution process, yet the *Court Order Enforcement Act* contains no mechanism to deal with the complications which result.

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[69] 69. A "bailee" in the strict sense is a person who undertakes to hold an item of personal property for another for a specific purpose and is obliged to redeliver the identical item when the purpose is accomplished. In a true bailment, there is no passage of property in the item to the bailee. This is not always the case in many of the situations discussed in this Report. *E.g.*, when a lender advances money, taking a pledge of the borrower's securities as collateral which is then perfected by depositing the security certificates in the lender's custody, the lender may acquire certain proprietary rights in the securities, depending on the terms of the pledge. On the other hand, a deposit with a custodian for safekeeping alone may give rise to a classic bailment.

[70] 70. In this Report we use the term "investment dealer" compendiously to refer to stockbrokers, securities dealers, securities firms, brokerage houses, and other persons and firms engaged in the business of buying and selling securities on behalf of other persons.

[71] 71. *Clarke* v. *Baillie*, (1911) 45 S.C.R. 50. There is also an implied authority for the investment dealer to repledge the securities for an amount equal to the amount of the loan: *ibid*. *See also Conmee* v. *Securities Holding Co.*, (1907), 38 S.C.R. 601. A broker in a margin transaction has been said to be in the position of a mortgagee with a right to submortgage. *(cont....)*

As the nature of a brokerage business requires constant access to a large mass of interchangeable securities in order to complete transactions from day to day, the agreement under which an investment dealer carries out transactions for a client gives wide powers over the securities in the client's account. The agreement allows the investment dealer to commingle securities belonging to or purchased on behalf of the client with those of other clients and with those held by the brokerage itself in order to ensure that enough will be available at any given time to fulfil an obligation which arises in the course of trading. Apart from any special arrangement, when a client calls for delivery of securities in the account, the investment dealer is not obliged to deliver the identical items deposited by the client or purchased at the client's order, but only an equivalent quantity of the same kind.[72] The fungible nature of most securities allows for this.

In many cases the securities held in a client's account will be registered in the name of the firm of investment dealers, a securities depository associated with an exchange, or a nominee of either the firm or the depository. This is done to facilitate trading. The securities will not be identifiable as the property of a particular client. The client will simply have a beneficial interest in a fungible mass of similar securities.

There are two basic kinds of client accounts, cash and margin. In a cash account, the client is required to pay the full price of any securities purchased within a short settlement period. In a margin account, the client purchases securities on credit, with the investment dealer financing part of the price. The portion paid by the client is called the margin. Minimum margin levels

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71. *(...cont.) See Allen* v. *O'Hearn & Co.*, [1937] A.C. 213, 219, [1937] 1 W.W.R. 258, 261 (P.C.). These powers are likely to be the subject of express contract nowadays.

[72] *Conmee*, *supra*, n. 71; *Mara* v. *Cox*, (1884) 6 O.R. 359, 387 (C.A.). The *Canada Business Corporations Act* and the *Bank Act* provide expressly that only equivalent quantities need be delivered, not the identical corporate or bank securities purchased. Exceptions might arise if securities are deposited for safekeeping only or for use exclusively as collateral security for advances. Standard dealer-client agreements, however, make any property of the client in the investment dealer's hands collateral security for the general indebtedness of the client at all times.

for various types of securities are determined by standards set by the exchanges.[73]

In a margin transaction the investment dealer makes what is in effect a loan to the client, and interest is charged on the price of the security less the amount of the margin. The investment dealer has a lien on the securities for the amount of the advance made to enable the purchase, plus the commission and interest.[74]

The standard agreement with the client will provide in addition that all securities and other property of a client resting with the investment dealer at any given time is pledged as collateral for the client's total indebtedness to the dealer. It will also allow the investment dealer to pledge the client's securities for loans needed for the operation of the investment dealer's business. While it may seem strange that the client's property can be used in this way, it is a custom of long standing and has been recognized many times by the courts.[75]

The investment dealer has a contractual power stemming from the standard client agreement to sell the client's securities in either form of account if the client fails to pay for them or fails to maintain adequate margin. Usually there will be a demand for payment or additional margin before doing so, but the agreement allows a sale without prior notice to the client.[76] It is essential for the investment dealer to have this power, as the ability to recover amounts loaned to clients could otherwise be rapidly eroded in a falling market. The inability to sell quickly could result in securities firms becoming financially overextended, as well as putting them in breach of regulatory standards regarding maintenance of adequate free capital.

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[73] The Canadian Securities Institute, *The Canadian Securities Course* (1989) 269.

[74] *Clarke, supra*, n. 71; *Mara, supra*, n. 72; *Re Stout and City of Toronto*, (1927) 60 O.L.R. 313 (C.A.).

[75] *See, e.g., Clarke* and *Conmee, supra*, n. 71; *Mara, supra*, n. 72 at 387. Present-day standard agreements between investment dealers and clients allow much more leeway in using clients' securities to raise money than did the common law in recognizing the customs of stockbrokers, however. Apart from express contract, a broker could not repledge a client's securities for more than the amount of the client's indebtedness to the broker: *Conmee, supra*. If this were done, the broker's creditor could retain the repledged securities as against their owner even after the owner had repaid all indebtedness towards the broker: *see London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201. Under the standard terms of dealer-client agreements today, clients must waive any such limitation on the use of their securities. Even cash balances standing to the client's credit may be commingled and used with the investment dealer's general funds, although the latter remains liable to repay equivalent amounts to the client on demand, subject to a set-off for amounts owed by the client. And, of course, an investment dealer must always remain in a position to deliver securities equivalent to those credited to the client's account once any indebtedness of the client has been reduced to nil.

[76] Canadian Securities Institute, *supra*, n. 73 at 271. Under the *Personal Property Security Act*, sale without notice may no longer be possible. The investment dealer is, by agreement, a pledgee of the items in the client's account. As such, the investment dealer has a possessory security interest recognized by the Act. The client's obligation, for which the securities stand as collateral, is to pay for securities purchased or to maintain adequate margin. The PPSA does not, as a general rule, allow waiver of the requirement for prior notice of a disposition of the collateral by the secured party: *see* ss. 56(3), 59(6). There is an exception in the case of collateral which the secured party believes on reasonable grounds will decline substantially in value if not disposed of immediately. (*See* s. 59(17)(b)). A case decided under similar Ontario legislation, *Jones* v. *Davidson Partners Ltd.*, (1981) 121 D.L.R. (3d) 127 (Ont. H.C.) suggests that securities may fall into this category, but this would depend on the facts of the situation and on what is considered to be a "substantial" decline in value.

2. EXECUTIONS AND SECURITIES TRADING

A seizure of a quantity of securities from a client's account deprives the investment dealer of the use of them in the commingled inventory needed to fulfil trading obligations. It also deprives the investment dealer of the discretionary power to sell the securities to prevent a loss in a falling market and to avoid breach of regulatory standards. At the least, this results in a disruption of business operations and might require excessive borrowing of securities from other firms. At the worst, it could result in substantial loss. A very large seizure could threaten the continuance of the operation.

The clearing house systems on which securities exchanges operate also depend on the continued circulation of a large mass of securities. If the central clearing house guarantees the settlement of trades, as is the case with the Vancouver Stock Exchange, it too may incur a loss if a seizure of a quantity of securities from the account of a member's client prevents that member from completing a transaction.

G. Securities Not Mentioned in the *Court Order Enforcement Act*

Sections 57 to 63 of the *Court Order Enforcement Act* refer to stock, shares and dividends. Some types of bonds and debentures may be exigible under section 52, but there is no mention in the Act of the many other kinds of interests bought and sold in the securities market today, such as options, warrants, strip bonds, trust units, commodity futures and precious metal certificates, to name only a few. The exigibility of many of these newer kinds of securities is in some question.

H. Summary

This review of the current law of execution against securities in British Columbia has shown that a large measure of uncertainty surrounds even quite basic issues.

It is not clear whether interests less than outright ownership, such as an equity of redemption in a mortgaged share, can be taken in execution. It is also unclear whether it is section 52 or section 58 of the *Court Order Enforcement Act* which governs a seizure carried out by taking possession of share certificates. The two sections vary in directing the sheriff how to dispose of the property seized. The cases decided under the present legislation are not in agreement as to whether the sheriff is free to ignore a restriction imposed on the transfer of shares in a private company when selling the shares after they have been seized. They differ also on the question of the exigibility of shares in a foreign corporation.

It is possible for certificated shares to be seized merely by serving a notice of seizure on the issuing company, without taking the certificates into custody. Leaving the share certificates in circulation creates pitfalls for innocent purchasers and lenders. A further, and major, defect of the legislation is that it is totally unadapted to the circumstances of the modern securities market.

Even if the law in this area were fairly settled, the fact that the present legislation is so seriously outdated in terms of its language, scope, and practical effect presents a strong argument for reform. In the next Chapter we present our conclusions regarding the changes needed to bring this area of the law of execution into harmony with present-day conditions and practices.

REFORM

A. General

Sections 57 to 63 of the *Court Order Enforcement Act* are seriously deficient. In our view, they should be replaced with a modern legislative framework for execution against securities having the major objectives described below.

First, there is a need for the new legislation to be comprehensive. It should apply to all the various kinds of assets which, together with the familiar company share, are commonly termed "securities." This would remove the present uncertainty as to which provisions of the Act govern the seizure and sale of particular kinds of securities.

Lingering doubts about the exigibility of partial interests in securities should also be removed. A judgment debtor should not be able to insulate wealth from creditors' claims by converting it into forms to which the legislation does not extend. At the same time, the legislation should explicitly recognize and protect the pre-existing rights of third parties in seized securities.

A major defect in the present law is that its procedures are adapted to only one setting in which securities are found, namely the non-trading context. They are not adaptable to conditions in the securities market. Procedures must be developed which allow the seizure and sale of assets held in active trading accounts without disrupting the operation of the market.

As the law now stands, the shareholders of a closely-held private company have little, if any, protection against having an unwanted newcomer forced on them as a result of a purchase of shares at an execution sale. A further goal of reform should be to accommodate the interests of the other shareholders in maintaining internal control as far as it is possible to do so without insulating the wealth, which may be concentrated in the judgment debtor's shares, from his creditors.

The execution procedures and the law surrounding them should minimize the risk of loss to third parties, which can be substantial under the law as it now stands. If third parties are overprotected, however, execution may become a completely futile exercise. This is to be avoided.

Finally, execution law should be compatible with the *Personal Property Security Act*,[1] a major reform in debtor-creditor law which has a significant bearing on the rights of judgment creditors.

These objectives call for a rather delicate balancing of competing interests, but it is one that we believe can be achieved. An initial step towards a comprehensive legislative framework for execution against securities is to find a satisfactory way to describe them for that purpose.

B. Defining Securities as a Class of Exigible Property

1. GENERAL

The phrase "stocks and bonds" is a common one. The public is accustomed to speaking of "stocks" and "bonds" in the same breath, as if referring to a single species of property, even though the legal nature of a "stock" is different from that of a "bond."

Stocks are "equity" securities, representing a fractional ownership interest in the issuer and its commercial undertaking. The purchase price paid in the initial distribution of a security of this kind represents a contribution to the capital of the issuer. The most familiar kind of equity security is a share in a company, but equity-related interests, such as share options and warrants,[2] are also traded on stock exchanges. Unit trusts sell units of participation in the income and capital distributions of the trust. The units each represent a beneficial interest in the trust assets.

Debt obligations represent the other major category of securities. Holders of debt securities are creditors of the issuer. The original purchaser of a bond essentially makes a loan to the issuer in the amount of the face value, which is to be repaid with interest at a rate stated in the bond.

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[1] S.B.C. 1989, c. 36, as amended.

[2] A *warrant* is a certificate which entitles the holder to acquire shares at a predetermined price for a limited period of time. Warrants are often issued in connection with a new share issue to encourage further purchases. The term *warrant* is also used to refer to a certificate embodying a so-called "right." A "right," in securities industry terminology, is a privilege granted by an issuer to its existing shareholders to acquire further shares at a preferential price. Rights can also be bought and sold.

Options are contracts giving the privilege of buying or selling a certain quantity of some underlying interest, *e.g.*, shares, currency, or precious metals, at a predetermined price for a stated period of time. Purchase options are termed "calls." Options to sell are known as "puts." Unlike warrants and rights, share options do not emanate from the issuer of the shares.

The lines of demarcation between equity and equity-related securities on the one hand, and debt securities on the other, are not completely clear. Some kinds of debentures,[3] for example, are convertible into shares. Others may be sold together with a share warrant. Some types of preferred shares are "redeemable" by the issuer in much the same way as the issuer may redeem outstanding debt obligations.[4] Nevertheless, most securities can be said to fall into either the debt or equity category.

The feature that is common to equity and debt securities is that they are created by dividing a sum of money to be raised into units of contribution having the same value, attaching certain rights and privileges to the units such as the right to vote or receive dividends or interest, and selling the units (or the right to acquire them) to investors in order to raise the sum. Institutional sources of capital such as banks are bypassed. It is this feature which causes the two categories of securities to be associated in one's thinking, as exemplified by the phrase "stocks and bonds," despite the difference in their legal character.

Very often, an investor who has shares will hold debt securities as well. The passive investor who is concerned primarily with interest and dividend income rather than obtaining quick gains from rapid trading may keep share and bond certificates together in a safety deposit box. If the investor does "play the market," both equity and debt holdings may be bought and sold through the same investment dealer and entrusted to that dealer for trading purposes. If the investor borrows money and pledges the shares and bonds to the lender to secure the debt, the lender will usually insist that the pledge be perfected in the same way, namely by depositing the certificates for each.[5]

Since equity and debt securities are likely to be found in the same places and under the control of the same persons, it would be efficient for the sheriff to be able to use the same procedures for seizing and disposing of the two kinds of securities. If the procedures for seizure and disposal are to be the same, the legislation which prescribes them can treat equity and debt securities as a single class of property.

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[3] The term "debenture," used in the securities market context, properly applies to a type of bond which is supported only by the general creditworthiness of the issuer and is not secured by any specific assets. It is also employed outside the securities market context, perhaps more frequently, to refer to a debt instrument granted by a corporate borrower to a single lender or a defined group of lenders rather than being issued to the public, and which is generally secured by a floating charge on the borrower's general undertaking and fixed charges on specific assets.

[4] Preferred shares are shares which entitle the holder to priority over holders of common shares in a distribution of the company's assets on liquidation, and in respect of payment of dividends. In most cases the right to redeem is exerciseable unilaterally by the issuing company. Preferred shares which are redeemable on the demand of the holder are said to be "retractable:" Canadian Securities Institute, *The Canadian Securities Course* (1989) 182. Mutual fund shares must be redeemed at the owner's request at a price based on the fund's current net asset value per share: *ibid.*, at 326.

[5] A debt security will almost invariably be evidenced by a certificate. This was formerly true of shares as well but uncertificated shares are now more common. A pledgee of shares, however, will often insist that certificates be obtained for deposit purposes.

2. THE ATTRIBUTES OF A "SECURITY"

In speaking of a "security," one is referring to interests which may be evidenced by a document but which actually are intangible rights to certain kinds of benefits. General commercial understanding would include in that class of benefits the following:

- sharing in a distribution of profits from a corporate enterprise or fund
- participating in decisions concerning the control of a corporation's activities
- receiving interest on an amount contributed towards a loan,
- the right to pay a predetermined price for a quantity of a commodity to be delivered at a future time
- the privilege of buying or selling, at a predetermined price, the right to receive one or more of the benefits just described.

Broadly stated, these benefits are the ones conferred by an equity share, a bond or debenture, a futures contract, and an option, respectively. The above list is certainly not exhaustive, but illustrates what must, as a minimum, be covered by a comprehensive definition of "security."

The *Securities Act*[6] contains a lengthy definition, listing many specific kinds of interests.[7] The definition is suited to the purpose of that Act, which is to regulate trading in the stated kinds of interests. It serves to determine whether a particular transaction is covered by regulatory requirements or not. If "securities" are to be treated as a generic category of property for the purpose of execution, however, it may not be necessary to import such a detailed definition into the *Court Order Enforcement Act*.

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[6] S.B.C. 1985, c. 83.

[7] *Ibid.*, s. 1(1).

3. THE PPSA DEFINITION OF "SECURITY"

A useful, and fairly comprehensive, definition of "security" is found in the *Personal Property Security Act*:[8]

> "security" means a share, stock, warrant, bond, debenture or similar record, whether or not in the form of a security certificate, that
>
> (a) is recognized in the jurisdiction in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or that evidences an obligation of the issuer, and
>
> (b) in the ordinary course of business is transferred
>
> (i) by delivery with the necessary endorsement, assignment or registration in the records of the issuer or of an agent of the issuer, or by compliance with restrictions on transfer, or
>
> (ii) by an entry in the records of a clearing agency,
>
> but does not include a bond, debenture or similar record evidencing an obligation secured, in whole or in part, by a mortgage of an interest in land unless the interest being mortgaged is, itself, a mortgage of land;

4. REMODELLING THE PPSA DEFINITION

The PPSA definition should not be adopted into the *Court Order Enforcement Act* without some qualification, however. Modifications are required to make the definition fit the purposes of the latter Act.

(a) Equitable and Other Partial Interests

It was mentioned in Chapter II that the applicability of section 56 of the *Court Order Enforcement Act* to shares was somewhat doubtful, since it refers only to "goods and chattels." Moreover, the case authority which appeared to hold that equitable interests in shares were exigible by writ was seen to be somewhat weak.

Securities that are seized will often be encumbered by mortgages, pledges and liens. While encumbered securities are not likely to bring a very high price, the interest which the judgment debtor retains in them may have some realizable value. There is no need to make them immune from seizure as long as the rights of secured parties are protected.

The PPSA definition lacks an express mention of partial interests since the Act is chiefly concerned with the creation of partial interests securing the payment or performance of an obligation out of the full title to an item of personal property. The definition has to describe a "security" in terms of the entirety from which those partial interests are carved. The *Court Order Enforcement Act*, on the other hand, is concerned with the seizure and sale of a judgment debtor's interest in property, whatever its extent. Our definition, therefore, should ensure that interests less than the full legal and beneficial title are included.

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[8] *Supra*, n. 1, s. 1(1), as am. by S.B.C. 1990, c. 25, s. 53.

(b) An Interest in a Fungible Mass of Securities

As described in Chapter II, the shares of individual owners may lose their identity through commingling with the holdings of other owners in the inventory of a brokerage house or a securities depository. It may not be possible to trace a judgment debtor's holdings by certificate numbers or some other means. In many cases, the holdings of an individual judgment debtor can only be described in terms of a certain proportion of a mass of similar securities. Our definition should cover this situation as well.

(c) One of a Divisible Series

The kind of property with which this Report is concerned consists of instruments which are identical units of a divisible series. The terms "bond" and "debenture" are commonly used to refer to debt instruments of this kind and also to debt instruments which have no counterpart, are not intended for even limited public distribution and which evidence an obligation owed to a particular creditor. As it is necessary to distinguish between the two kinds of debt instruments for our purposes, the requirement of divisibility should be added as an element of the definition.

(d) Other Forms of Securities

Securities markets are constantly evolving. Various kinds of investment vehicles fall into disuse and new ones are devised. A definition of "security" that will stand the test of time must accommodate new kinds of investments as they appear on the market.

The American *Uniform Commercial Code* describes a security as something which is "of a type commonly dealt in on security exchanges or markets."[9] This wording allows novel forms of investment vehicles to fit into the definition, and is worthy of adoption.

5. "SECURITY" REDEFINED FOR THE COURT ORDER ENFORCEMENT ACT

The definition of "security" emerging from the above discussion might take this form:

"security" means

- (a) a share, stock, warrant, bond, debenture or similar instrument, whether or not represented by a security certificate, that
  - (i) is recognized in the jurisdiction in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or that evidences an obligation of the issuer,
  - (ii) is one of a class or series or is by its terms divisible into a class or series of instruments, and
  - (iii) in the ordinary course of business is transferred
    - (A) by delivery with the necessary endorsement, assignment or registration in the records of the issuer or of an agent of the issuer, or by compliance with restrictions on transfer, or
    - (B) by an entry in the records of a clearing agency,
- (b) any right, interest or obligation, whether or not represented by a certificate, commonly traded on securities exchanges or markets, or
- (c) a beneficial or other interest in, or portion of, anything described in paragraphs (a) or (b) or in a fungible mass of securities;

This should be sufficiently comprehensive to encompass the interests commonly classed as "securities" today as well as new forms of investments that may appear in capital markets. It should facilitate an effective execution process against this class of property.

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[9] *Uniform Commercial Code*, s. 8-102.

C. Method of Seizure

1. GENERAL

All methods of seizure are directed toward the same end: to take control of the item to be seized. Where that item is a tangible object, it is possible to obtain control over it by physically taking it into possession. The task is more difficult if the property to be seized is intangible.

The method of seizure by notice which is prescribed by section 58 of the *Court Order Enforcement Act* is based on the theory that the share register of an issuer is an authoritative record of ownership. By notifying the issuer that a member's shares are seized and that it must not record a transfer of those shares by the member, so the theory goes, the shares will be immobilized.

The certificate seizure method approved by *Re Patmore*,[10] *O'Hara* v. *Fox*[11] and *R. in Right of British Columbia* v. *Yu*[12] assumes that the share certificate identifies the judgment debtor as the registered holder or at any rate is traceable to the judgment debtor.

These theories may hold true for the non-trading or non-market context of securities ownership where possession is relatively static. For the reasons stated in Chapter II, they do not hold true if the securities are used for active trading purposes. Possession of securities, in the latter setting, is anything but static. Instead, the judgment debtor's holdings would be constantly in flux. The judgment debtor's position at a given point in time could only be established by examining the records of the investment dealer pertaining to the account.

Since exigible wealth is to be found in either setting, the methods of seizure prescribed by the *Court Order Enforcement Act* must function in both. We will discuss, firstly, methods which can be employed in the non-market context. Later in the Report, we propose a mechanism which we believe is suited to the more complex setting of the active market.

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[10] (1962) 39 W.W.R. 460 (B.C.S.C.).

[11] [1973] B.C. Unrep. Dec., sub-heading "Execution Act" (S.C., Cranbrook Registry).

[12] (1984) 55 B.C.L.R. 329 (S.C.).

2. SEIZURE IN THE NON-MARKET SETTING

(a) General

The context we will designate as the "non-market setting" is one in which securities are not in the possession of an investment dealer. Private company shares acquired primarily for ownership and control purposes and bonds used as long-term investments or as savings devices will be found in this setting. It is not only these which may exist in the non-market setting, however. Once they have been acquired, even publicly traded shares and highly marketable bonds may be held by a passive investor outside the arena of the securities market. The following examples illustrate various aspects of the non-market setting.

EXAMPLE 1

A is the registered owner of 500 shares of XYZ Inc., a publicly listed company, and keeps the share certificates in a desk drawer. A also owns bonds issued by a public utility in the course of a major financing, and keeps them in a safety deposit box in a bank.

EXAMPLE 2

A forms a company, A Ltd., to carry on a business. A is issued 100% of its shares. The share certificate showing A as the owner of all the issued shares in A Ltd. is kept with the corporate seal and minute book at the office of A's lawyer, which is also the registered office of A Ltd.

EXAMPLE 3

A Ltd. must borrow money to finance its operations. A, as the sole shareholder, guarantees a bank loan to A Ltd. and pledges the 500 shares in XYZ Ltd. and the bonds to the bank as further collateral. The bank becomes registered as the owner of the shares in XYZ Ltd. and requires A to surrender the bonds. The bank holds the bonds and the share certificates pending repayment of the loan by A Ltd.

In these examples, changes of possession or control of the securities will be infrequent and specific securities are generally traceable to a particular owner. The securities are held for purposes other than the realization of short-term gains in value. These are characteristics of the non-market setting.

(b) Certificated Securities

While both certificated and uncertificated securities can be found in the non-market setting, they are much more likely to be certificated. This is because uncertificated securities are largely a product of book-based trading of equity securities on stock exchanges. Bonds and other debt securities will almost invariably be represented by a document.

It is difficult to conceive of a means of seizing an intangible thing like a share or a debt other than by communicating to the person who has effective control of it that it has been appropriated, or by taking possession of something which serves as evidence of it. Usually this would be a document. The debate over the appropriate way to seize a certificated security therefore focuses on the relative merits of these two methods.

The procedure for the seizure of shares by service of notice on the issuing company under section 59 of the *Court Order Enforcement Act* treats a share as a purely intangible asset, similar to a debt. The procedure is similar to service of a garnishing order on a person who owes money to a judgment debtor. Nothing more is needed to perfect the seizure. It can be used in any case in which the company has a place for service in British Columbia, but it fails to come to terms with the fact that the certificate for the seized security can remain in circulation afterwards.

ARGUMENTS FOR RETAINING THE NOTICE PROCEDURE

(A) General

The reality of the execution process is that some types of property, by their very nature, lend themselves to concealment or manipulation by the judgment debtor. Money, for example, is highly portable and easy to hide, remove from the jurisdiction, or convert into other kinds of wealth. Its very existence may be difficult to ascertain. This might be contrasted with land. Its ownership is a matter of public record; it is not highly liquid; it cannot be concealed; the debtor cannot pick it up and move it to another jurisdiction.

If seizure of the certificate became essential for execution against certificated securities to take place, the effect would be to assimilate securities to money and other kinds of negotiable documents. It would permit the judgment debtor to conceal wealth in the form of securities, move it out of the jurisdiction and generally to delay and hinder the judgment creditor's legitimate efforts to proceed against this kind of asset.

(B) Securities in the Control of Bailees

There are numerous situations in which security certificates may be held by a person other than the judgment debtor for valid reasons. Possession[13] of a security by a person other than its owner often denotes the existence of an interest which might be impaired or destroyed if possession is relinquished. Pledges and mortgages of securities are generally perfected by depositing the certificates with the secured party, or by causing them to be registered in the secured party's name. The *Personal Property Security Act* recognizes possessory security interests, allowing them to take priority over executions if they are perfected by acquiring possession of the collateral before a seizure takes place.[14] Loss of possession, however, may lead to a loss of priority.[15] (continued...)

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[13] In this context, "possession" means not only physical possession of a certificate or other document representing a security, but also constructive possession resulting from effective control, such as might emerge from registration of a security in the name of a bailee or the bailee's nominee. Possession of an uncertificated security, of course, can only be constructive.

[14] S. 20(a).

[15] Priority may sometimes persist after the secured party has relinquished possession, but only for a limited time. S. 26(1) of the *Personal Property Security Act* allows a security interest in an instrument or security perfected by possession to remain perfected for 15 days after the collateral is delivered to the debtor for the purpose of:

(a) ultimate sale or exchange;
(b) presentation, collection or renewal; or
(c) registration of transfer.

After the fifteen days expire, the security interest ceases to be perfected and other interests may take priority: s. 26(2). S. 28(3) extends the priority to the proceeds of the original collateral for 15 days from the time the security interest is converted from one in the original collateral to one in its proceeds. Ss. 26 and 28(3) would apply to a situation in which an investment dealer has repledged clients' securities acquired on margin to a bank as collateral for operating loans. When the securities are to be sold, either at the order of the client or because the client has not answered a margin call, the bank could release them to the investment dealer without loss of priority, either in the securities themselves or in their proceeds for 15 days.

Section 31(3) of the Act allows a purchaser of a security for value without notice of the existence of a security interest to prevail over the secured party: *(cont....)*

(...continued)

In addition, the *Personal Property Security Act* requires a secured party who is in possession of collateral consisting of a security to take steps to preserve rights against other persons.[16] Failure to do so may give rise to liability in damages.[17]

Securities may be held by a trustee for a number of beneficiaries, one of whom may be the judgment debtor. Relinquishing possession to the sheriff would be inconsistent with the duties of the trustee and might make it impossible to administer the trust properly.

Escrow arrangements involving securities are fairly common. These involve the retention of securities by a neutral party, or by the issuer, pending the fulfilment of some requirement imposed by a regulatory authority or the due performance of an obligation.

These examples involve interests which are as worthy of protection as that of a judgment creditor. Since a judgment creditor can only cause the seizure and sale of the actual interest owned by the judgment debtor so far as it extends, it should be possible to seize the judgment debtor's interest without dislodging the securities in a manner tending to impair the rights of third parties.

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15. *(...cont.)*

(3) A purchaser of an instrument or a security has priority over a security interest in the instrument or security perfected under section 25 [by registration of a financing statement] or temporarily perfected under section 26 or 28(3) if
- (a) the purchaser gave value for the instrument or security,
- (b) the purchaser acquired the instrument or security without knowledge that it was subject to a security interest, and
- (c) in the case of a security or instrument that
  - (i) is not a security with a clearing agency, the purchaser took possession of the instrument or security, or
  - (ii) is a security with a clearing agency, an entry has been made in the records of the appropriate clearing agency indicating the the security has been transferred to the purchaser.

[16] S. 17(2). This cannot mean that a secured party must resist a lawful seizure under a writ of execution. Such resistance would amount to a criminal offence under s. 129(c) of the *Criminal Code*. It could mean, however, that a secured party must take steps to determine the validity of a seizure if there are any grounds for doubt concerning it.

[17] PPSA, s. 69(2).

ARGUMENTS FOR INSISTING ON SEIZURE OF CERTIFICATES

The view that execution law should require seizure of the actual security certificate is based on the proposition that the certificate has virtually acquired the status of a document of title. Ownership is identified with the certificate in much the same way that the ownership of a debt is identified with a negotiable promissory note which may cover the debt. Transfer can be accomplished in much the same way as ownership of a debt covered by a promissory note: by physical delivery of the document with necessary endorsements.

The notice procedure allows transfer of the interest underlying the document without a corresponding transfer of the paper. Currently, the legislation allows a seizure to take place in this manner without the knowledge of the judgment debtor. Whether the judgment debtor is aware of the seizure or not, contests like those described in Chapter II may arise between innocent purchasers or mortgagees relying on the judgment debtor's possession of the security certificate, and those purchasing from the sheriff.

It is counter-productive to permit execution to cast a shadow over the integrity of transactions in securities merely for the convenience of judgment creditors. It is equally so to put a purchaser from the sheriff at risk.

Physical seizure of the security certificate is effective in preventing post-seizure dealings by the judgment debtor, and the sheriff is in a better position to conduct a sale if the certificate is available to be turned over to the purchaser, who can then present it to the issuer in order to be registered as the owner. Lessening the risk to the purchaser is more likely to result in a higher price for the seized security.

A procedure is available under the *Rules of Court* for the examination of the judgment debtor in order to identify the existence and location of various assets.[18] This is a partial answer to the argument regarding the difficulty of finding security certificates. Locating a judgment debtor's assets is often an obstacle in attempting to enforce a judgment. Furthermore, the difficulties faced by a judgment creditor in locating security certificates are no different from those associated with finding other kinds of commercial documents that are also exigible, such as cheques and promissory notes, or goods such as jewelry. These too are subject to easy concealment and transfer.

If there are competing claims to possession of the certificate, the document should be surrendered to the court. Once this is done, the validity of the claims can be determined and the sale of the judgment debtor's interest can take place without the danger that intervening dealings might defeat the title of a person purchasing from the sheriff.

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[18] *Rules of Court*, R. 42(23)-(30).

(c) Conclusion

(i) Certificated Securities Generally

On balance, the need to maintain the integrity of transactions in securities and to avoid prejudice to third parties outweighs the disadvantage faced by a judgment creditor in having to locate and take physical possession of security certificates. It makes little sense to provide for seizure by notice to the issuer, without more, if the certificate remains at large and the judgment debtor is able to deliver it, innocently or fraudulently, to a third party. Unless it is apparent that there are interests competing with that of the judgment debtor to be taken into account, an execution against certificated securities should be carried out by the actual seizure of the certificate.

(ii) Securities in the Control of Bailees

While possession of the security certificate by a third party signals the possibility that competing rights may exist, the sheriff would not often know at the outset what those rights are or whether physical removal of the certificate would impair them.[19] Provided that the bailee knows the judgment debtor's interest is being seized, however, there is less danger that the seizure will be evaded when a bailee holds the certificate than if the judgment debtor has possession of it.

These factors militate in favour of retaining the notice procedure for securities in the possession of a bailee. The bailee, having effective control of the security for the moment, would be the appropriate recipient of the notice of seizure.

In order to bring about the disclosure of interests which compete with the execution and a determination as to whether the bailee is entitled to withhold the certificate from the sheriff, the sheriff could demand the surrender of the security certificate when the notice of seizure is served. The sheriff, or a bailee objecting to surrender the certificate, would then have the opportunity to apply to the court for a determination as to the validity of the objection. The court could also give directions for any dealings with the certificate which might be necessary for the sale of the judgment debtor's interest to take place without destroying the other rights which might exist in relation to the document.

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[19] If a secured party has registered a financing statement in the Personal Property Registry covering the judgment debtor's securities, this information would be available to the sheriff. The sheriff would not likely be aware of the details of a security interest perfected by possession alone.

(d) Seizure of Uncertificated Securities

(i) Where the Judgment Debtor is the Registered Owner

The notice method of seizure must remain available at least for this class of assets.[20] The sheriff cannot assume effective control over property which has no physical embodiment in any other way.

Who, then, should receive the notice of seizure? Service on the judgment debtor alone would be ineffective if the judgment debtor decides to evade the execution. On the other hand, communicating the information to the issuer that the securities are under seizure would likely prevent a transfer intended to evade the sheriff from being recorded. This is the strategy behind the current section 59 of the *Court Order Enforcement Act*. While section 59 fails to deal with the complications which can arise from dealings with certificates remaining in circulation after seizure, the requirement to serve the issuer is workable insofar as uncertificated securities are concerned, since recognition of ownership of an uncertificated security depends on registration. It is not evidenced by possession of a document.

If an issuer is located entirely outside the Province, there may be no means of enforcing the notice directly. The issuer would be outside the jurisdiction of British Columbia courts. There would often be a local transfer agent[21] to maintain records of the ownership and process transfers of issued securities within the Province, however The sheriff should be able to serve a notice of seizure of uncertificated securities on either the issuer (if there is a place in British Columbia where service can be carried out) or its transfer agent.

(ii) Where a Bailee is the Registered Owner

Uncertificated securities owned beneficially by the judgment debtor may be registered in the name of a bailee. The bailee may be a nominee of the judgment debtor, a trustee, or possibly a secured party who has obtained registration in order to safeguard a mortgage or pledge of the securities granted by the judgment debtor.[22] In cases like these it would not be of any use to serve notice of seizure on the issuer or the transfer agent alone, since they would likely have no record of the judgment debtor's interest and thus would probably be unable to identify the securities that are affected.

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[20] The comments in this section apply to cases in which uncertificated securities are not held in an account with an investment dealer. These will be fairly rare. Generally speaking, only investment dealers are able to deal with uncertificated securities effectively through electronic book-entry trading.

[21] A transfer agent is an agent appointed by an issuer to maintain records of the ownership of the securities, and to register transfers of them. A transfer agent may also distribute dividends and similar payments. An issuer may have a transfer agent in each jurisdiction in which its securities are sold. Transfer agents are usually trust companies.

Since the bailee is registered as the owner of the uncertificated security for the time being, third parties unaware of the bailee's relationship with the judgment debtor would consider the bailee to be the person entitled to transfer it. The issuer would probably view the bailee in this light as well. In order for the security to be immobilized, the bailee must be informed of the sheriff's intention to seize it.[23] It is reasonable, therefore, to require the notice of seizure to be served on the bailee.

(e) Dividends and Other Payments Relating to Securities

(i) Seizure of Incidental Payments

Under section 59(3) of the *Court Order Enforcement Act* as it now stands, dividends and other payments associated with shares are also seized or "attached" by the seizure of the shares themselves. But for this provision, a dividend could only be attached by garnishment or the appointment of a receiver.[24] Rather than requiring a judgment creditor to obtain a garnishing order as well as a writ of execution, it makes sense to carry forward the policy of the present section 59(3) and expand it to payments associated with other kinds of securities, such as interest payable under bonds and debentures.

Some modification of the terminology of the provision is required in order to extend the principle to securities other than equity shares. Section 59(3) now states that every seizure and

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22. Most frequently, uncertificated securities would be registered in the name of an investment dealer or a securities depository, since they are likely to be issued by a public company and encountered primarily in the market setting.

23. Of course, a bailee who is a secured party may have rights over the securities which take priority over those of the sheriff. This does not prevent a seizure of the judgment debtor's residual interest, nor does it change the fact that the bailee has control of the security for practical purposes and is thus the key person on whom the notice of seizure should be served.

24. Once it has been declared, a dividend is a debt of the company. Shareholders may sue to recover it like any other debt. *See In re Severn and Wye and Severn Bridge Co.*, [1896] 1 Ch. 559, 564; *Re Northern Ontario Power Co.*, [1954] 1 D.L.R. 627, 631 (Ont. S.C.). Part 1 of the *Court Order Enforcement Act* provides for the garnishment of debts.

sale shall include "all dividends, premiums, bonuses or other pecuniary profits on the stock or shares seized." "Premium" could have several meanings in the present-day context.[25] Interest should be expressly mentioned in order to cover payments associated with debt securities. Deleting the adjective "pecuniary" would allow non-monetary benefits to be attached. Terms better suited to a legislative scheme for execution against securities in general, under which the broadest range of incidental benefits could be reached, would be simply, "all dividends, interest and other benefits."

(ii) Notification to the Issuer

If the seizure is carried out otherwise than by serving a notice on the issuer, the fact of the seizure must be brought to the issuer's attention in order that the incidental payments can be diverted to the sheriff. Who should have the responsibility to give the notice? The sheriff, in carrying out the seizure, has already discharged the traditional responsibility of executing the writ. A judgment creditor who resorts to garnishment has the responsibility for serving the order on the garnishee. It is not onerous to require a judgment creditor wishing to attach payments associated with seized securities to bear the responsibility for informing the issuer of the duty to divert the payments to the sheriff. This is especially true since the judgment creditor obtains the benefit of the incidental payments without having to apply for a garnishing order or for the appointment of a receiver.

3. SEIZURE IN THE MARKET SETTING

(a) General

By the term "market setting" we mean a situation in which a judgment debtor maintains an account with an investment dealer for the purpose of carrying out trades in securities. In contrast to what we have termed the "non-market setting," where securities change hands only occasionally, the market setting is characterized by transitory ownership. The usual objective of ownership in the market setting is to realize capital gains from the short-term fluctuations in the value of securities. The extent of the holdings of a judgment debtor actively engaged in buying and selling securities will change constantly and generally can be determined only in relation to the status of the account at a given point in time.

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[25] The term "premium" is used to describe: (i) the price paid for an option, (ii) the difference between the price received for a share in excess of its par value, (iii) the increase in market value over the original price of a securities issue, and (iv) the excess of the price at which a bond or preferred share is redeemed over its face, par, or market value: *The Canadian Securities Course*, *supra*, n. 4, 17.

If the securities held in a judgment debtor's account are certificated, it will probably be impossible to link any certificates with the judgment debtor. As mentioned in Chapter II, they will probably be in a depository and will likely be registered in a name other than the judgment debtor's. Very likely the name will be that of the depository or its nominee. The certificates may cover the holdings of many persons and the depository will have no record of the beneficial ownership of the securities represented by the certificates. Clearly, certificate seizure is impractical in this situation.

It would be equally impractical to attempt a seizure in the market setting by serving a notice of seizure on the issuer. Two levels of intermediaries come between the issuer and the real owner of its securities. The issuer has no knowledge of the judgment debtor, and therefore has no idea as to which of its securities are affected.

With certificate seizure being out of the question, seizure by notice must be employed. As in the earlier discussion concerning seizure in the non-market setting, it must be asked: who has effective control of the securities so as to be able to prevent them from being dealt with in a way inconsistent with a seizure? There can really be only one answer: the investment dealer with whom the judgment debtor maintains the account. Being in a position to carry out trades in the judgment debtor's securities, the investment dealer is also in a position to prevent them. In the market setting, notices of seizure should be served on investment dealers.

(b) Effect of a Notice of Seizure in the Market Setting

Many of the difficulties described in Chapter II concerning seizure of securities in the market setting stem from the need to hand over blocks of securities to the sheriff, removing them from the trading system while the execution process grinds forward to completion. If a way could be found to leave the seized securities in the commingled mass that is vital for modern securities trading and merely divert to the sheriff the wealth they represent, execution could be carried out without disrupting the market and causing possible loss to third parties.

Such a process requires the seizure to focus on the account itself rather than on specific securities held in it. The sheriff would rarely be in a position to know what portion of the account would, if sold off, raise sufficient proceeds to satisfy the judgment. In any event, the price of securities is generally more apt to fluctuate than is the price of other kinds of property. A block of shares which the sheriff designated for seizure might suddenly drop in value before it could be sold, making another seizure necessary. The only way the sheriff can be certain that as much of the judgment debt as possible will be recovered from the proceeds of the property held in the account is to seize the entire account.

It is not necessary that a seizure of a judgment debtor's account with an investment dealer have precisely the same connotations as a seizure of specific securities in the non-market setting. The purpose of seizing the account is to permit sufficient assets to be applied to the payment of the judgment debt. This can be done without the sheriff having to assume direct administration of the account. It can also be done without depriving the investment dealer of the powers, derived from contract with the judgment debtor, that do not depend on the judgment debtor's contemporaneous consent and are needed to react swiftly in order to prevent losses, such as the power to sell securities in the event of undermargining. What is crucial, however, is that the judgment debtor be prevented from having access to the account until as much of the wealth in it as is needed to satisfy the writ has been diverted to that end. The account must be "frozen" only insofar as the judgment debtor's ability to direct the investment dealer's management of it and to withdraw assets from it is concerned. In other respects it can remain an active element within the trading system.[26]

The legal effect of serving a notice of seizure of an account would be to prohibit the investment dealer from acting on any *subsequent* order by the judgment debtor relating to the account, allowing the withdrawal of any assets from it, or making any payment to the judgment debtor until the seizure has been discharged. The investment dealer should remain able to fulfil an order made by the judgment debtor *before* the seizure because the policy of minimum market disruption entails that seizure should not interfere with the completion of transactions which have already begun. We will explain how the seizure would be discharged later in the section of this Report dealing with the disposition of securities.

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[26] The American *Uniform Commercial Code* provides for a similar result when a security is seized in the hands of a "financial intermediary." Under s. 8-317(5) of the UCC, a seized security can be transferred for value, but the creditor's lien attaches to the proceeds. The procedure we envision focuses on the judgment debtor's account rather than individual items in it, however.

(c) Dividends, Interest and Other Incidental Payments in the Market Setting

Dividends on shares held in the market setting flow through a chain of intermediaries and ultimately to the beneficial owners of the shares. An issuer pays dividends to nominal owners appearing on its share register as of a certain date. The registered owners will often be depositories or major investment dealers holding large blocks of shares for their clients. The depositories then distribute the dividends among the investment dealers according to the volumes of that issuer's shares they have on deposit. The handling of dividends and other so-called "entitlements" in this manner is an important function of a securities depository. The investment dealers receiving the payments from a securities depository or from the issuer credit the dividends to client accounts according to their clients' respective positions in the issuer's shares.

Dividends on shares held in a seized account would be intercepted once they reached the account because the investment dealer would be prohibited from allowing the judgment debtor to withdraw any assets. They could then be applied to the writ along with other cash balances credited to the account. This would avoid the need to resort to garnishment to attach such payments.

If interest on debt securities or other payments related to securities moved through the investment dealer to the judgment debtor's account, they would be intercepted in the same manner.

D. Disposition of Seized Securities

1. GENERAL

Section 58 of the *Court Order Enforcement Act* imposes an unnecessary constraint on the disposition of seized shares by providing that they shall be sold "in a similar manner as other personal property." The current practice of adhering to the strict wording of the writ of execution[27] by offering seized shares for sale by public auction may not always realize the best price. It is well known that forced sales often result in bids that do not reflect fair value. The market for publicly traded securities is much more institutionalized and sophisticated than that for most other kinds of personal property, and there appears to be no good reason for insisting on the traditional "sheriff's sale" when the machinery of this market can be employed.

Access to that machinery would be facilitated by the method described in this Chapter for seizure of the judgment debtor's account with an investment dealer. It need not be restricted to cases where there has been a seizure in the market setting, however.

2. DISPOSITION OF SECURITIES SEIZED IN THE NON-MARKET SETTING

(a) Securities Without Transfer Limitations

If a security that has been seized in the non-market setting is of a kind that is listed on a recognized stock exchange, it should be sold on the exchange. This would best ensure that the fair market value of the security is obtained. As the sale would be conducted like any other trade in the same security, it would not have the negative impact on price associated with forced sales. The sheriff should be able to engage an investment dealer with a seat on the exchange to carry out the sale.

If the securities are not listed, they should be sold in a commercially reasonable manner. In most cases this would involve a public tendering process or auction, but the sheriff should not be forced to refuse an acceptable bid that is presented privately. This may be the only way to sell a partial interest, such as an equity of redemption in a security which the judgment debtor has mortgaged. Interests less than the full title would normally attract few buyers.

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[27] *See* Chapter II, *supra*, at 22.

The above conclusions are intended to apply to securities which are freely transferable.[28] Our conclusions with respect to the disposition of securities that are subject to limitations on their transfer are set out below.

(b) Securities Subject to Transfer Limitations

Shares in private companies[29] are used as instruments for the exercise of ownership and control within what is often, in reality, an incorporated partnership or proprietorship. In order to control the composition of the ownership group, they are very often subject to limited transferability. Transfer limitations may be contained in the incorporating documents or in bylaws, or be created by agreement between shareholders.

Typically, a transfer limitation in the articles of incorporation of a private company requires the consent of the directors before a transfer of shares can be registered. Another form frequently encountered is a requirement to offer shares to other shareholders, or to others holding the same class of shares, before offering them to anyone else. The corporation itself may be allowed the first right to re-acquire shares before they can be offered for sale.

(c) Reasons for Accommodating Transfer Limitations Within the Execution Process

The health of a business enterprise frequently depends on continuity of ownership and management. Stability and good relations within the shareholder group can be a major factor in preserving a private company as a going concern. Forcing a purchaser at an execution sale on a hostile shareholder group has a large potential for creating discord which could paralyze the internal affairs of the company. It may also create tensions with creditors. The activities of the company may have been financed on the assumption that the persons having the management and control would remain the same.

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[28] The disposition of securities that are free of transfer limitations may nevertheless be subject to regulatory requirements imposed by other legislation such as the *Securities Act*. *See* s. 115(4) of the draft legislation in Chapter IV.

[29] The *Company Act*, R.S.B.C. 1979, c. 59 uses the term "reporting company" to denote a corporation whose securities are listed for trading on an exchange. In this Report we adhere to the more common terms "public company" to denote companies whose securities are publicly traded and "private company" to denote those whose issued securities are not publicly traded. The shares of private companies are often subject to limitations on their transferability. The terms "widely-held" and "closely-held" refer to the pattern of share ownership at a given time and could conceivably apply to either kind of corporation.

In Chapter II, it was mentioned that British Columbia courts have given conflicting decisions as to whether the sheriff should attempt to sell shares in accordance with a transfer limitation.[30] The view that the sheriff is free to ignore a transfer limitation is based on the reasoning that the *Court Order Enforcement Act* has made shares exigible like other personal property and the policy of exigibility should not be undermined by internal corporate arrangements. Courts which have taken the opposite view have assumed that limitations on the transfer of shares have a legitimate purpose in a private company. They should not be automatically considered to be devices for evading execution.

The latter position is preferable from a policy standpoint. The interests of a private company should not be entirely dispensed with merely because of a judgment against a shareholder. The law should not lead to the disruption of a business enterprise organized on the basis of a defined ownership group where disruption can be avoided without denying recovery to the judgment creditor.

(d) How Transfer Limitations Can Be Accommodated

Legislation in some other provinces, though equally archaic as the current British Columbia provisions, requires the sheriff to allow the shareholders of a private company to bid on shares before they are offered to the public.[31] A procedure of this kind is better than riding roughshod over the rights of the insiders, but it fails to take full account of the hierarchy of rights to acquire shares which may exist within a private company. For example, a controlling position within the company may be protected by pre-emptive rights in addition to the kinds of transfer limitations described above.[32] There may also be options or rights of first refusal to acquire blocks of shares arising from contracts between individual shareholders. It is possible to recognize this hierarchy of purchase rights within the execution sale.

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[30] *See* Chapter II, *supra*, 10.

[31] S. 7(10) of the *Seizures Act*, R.S.A. 1980, c. S-11, as amended by S.A. 1988, c. 31, s. 20, provides:

> (10) If a sheriff seizes the shares of a debtor in a company, and the company's incorporating documents restrict or prohibit the right to transfer those shares, he shall first offer them for sale to the other shareholders, or any one of them, in the company, and shall send by mail to the company at its registered office and to at least 3 other shareholders of the company if there are so many, and, if not, to the other shareholders, notice of the seizure, and shall sell the shares seized or any part of them to any shareholder who within 30 days of the date of the mailing of the notice
>
> (a) makes an offer for the purchase thereof at a price that appears to the sheriff to be reasonable, and
>
> (b) pays the purchase price to the sheriff.

Saskatchewan and Ontario have similar provisions: *see The Executions Act*, R.S.S. 1979, c. E-12, s. 17(10); *Execution Act*, R.S.O. 1980, c. 146, s. 15.

The common type of transfer limitation consisting of a requirement that the directors approve any purchase or a stipulation that they may refuse to register a transferee in their discretion would clearly interfere with the policy of exigibility. It cannot be allowed to override the execution process. The process can recognize the interests of the insiders in remaining a closed group by giving them the first opportunity to purchase the shares, however. The hierarchy of purchase rights could be recognized in a structured process of bidding.

Thirty days is a reasonable amount of time during which tenders could be submitted by shareholders or by the issuing company itself. At the expiry of the 30-day period, the sheriff would consider the tenders received on the basis of a ranking specified in legislation. If no acceptable bid was submitted by those within a ranked category, the sheriff would proceed to examine bids from the next category.

The first rank should belong to those given special rights to acquire shares by the incorporation documents and bylaws, and to shareholders who have contractual options to purchase the judgment debtor's shares, as these persons have preferential rights of purchase recognized by the shareholder group itself. The second priority should go to the issuing company,[33] since repurchase of a share by the company would both cost and benefit the shareholders in proportion to their existing holdings. It might also provide an equitable solution if a competition arose between two or more existing shareholders. Following this, tenders submitted by holders of the same class of share as that seized should be considered. Last in the ranking scheme would be tenders submitted by shareholders of any other class.

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[32] A pre-emptive right is a right to purchase shares of any new issue in proportion to the holder's existing position relative to other shareholders in a company. An execution sale of the holdings of one shareholder has the same potential as a new issue of stock to alter the relative proportions of ownership within the company.

[33] Not every corporation may be entitled to repurchase its own securities under the law governing its status and powers. The common law prohibited a company from purchasing its own shares, but the rule has been altered by statute in many jurisdictions. In British Columbia the relevant provision is s. 259 of the *Company Act*, R.S.B.C. 1979, c. 59.

If no acceptable bids were submitted on behalf of the insiders or the company, the securities would be offered for sale as if there had been no transfer limitation.

(e) Transfer Limitations Specifying the Purchase Price

Sometimes transfer limitations contain a term regarding the price at which shares may be purchased by an insider. These may be troublesome in the execution context. The price that is stipulated may not be reasonable in relation to the real value of the shares. The approach taken in the Working Paper would have relieved the sheriff from having to observe a price stipulation unless it was commercially reasonable and did not prejudice the judgment creditor.[34] Some of the responses to the Working Paper suggested the sheriff should be bound by a term as to price in a transfer limitation unless the purpose of the term was to defraud judgment creditors.

The sheriff's duty in selling property under a writ of execution is to act fairly in the interests of both the judgment creditor and judgment debtor in obtaining a reasonable price for the assets.[35] A preferential price stipulation or other term which interferes with this overriding objective should not be absolutely binding on the sheriff, even if it is untainted with any fraudulent intent. To be consistent with the policy of preserving insider rights, however, the sheriff should give effect to a price stipulation or other term if it is reasonable in the sense of approximating the market value of the security. If the bid price is close to what would be obtained for the security on the open market, the judgment creditor cannot complain of prejudice. Difficulty may arise where there is no ready market for the securities in question, as may often be the case where small, closely-held companies are concerned. In some instances, the sheriff may have to seek the aid of the court to determine whether a tender at a predetermined price is reasonable.

One response to the Working Paper acknowledged that applications of this kind would be unavoidable, and suggested that the sheriff's duties be limited to conducting the tendering process and referring bids to the court for approval. The sheriff has to decide on acceptable offers when selling other kinds of assets, however. With respect, we do not think that the decision to accept or reject an offer should have to be referred to the court in every case. It is a sufficient safeguard for the sheriff to be able to seek the assistance of the court in difficult cases.

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[34] Working Paper No. 55, 58 (s. 114(3)).

[35] *Pease* v. *Judge*, (1914) 7 W.W.R. 804 (Sask. S.C.); *Bethune* v. *Corbett*, (1859) 18 U.C.Q.B. 498.

3. DISPOSITION OF A SEIZED ACCOUNT IN THE MARKET SETTING

(a) *Let the Investment Dealer Sell*

The procedure described earlier in this Report for seizure of an account was designed to minimize market disruption. The same objective should govern the design of a procedure for raising the sum needed to satisfy the writ from the proceeds of the account. Of course, the preference expressed earlier for the use of normal market channels in realizing securities seized in the non-market setting applies even more forcefully to the realization of an account with an investment dealer.

The simplest and most expedient means of realizing the wealth represented by the account is to empower the sheriff to direct the judgment debtor's investment dealer to raise the amount to be collected under the writ by selling from the account. Cash balances standing to the judgment debtor's credit in the account could also be used to satisfy the writ, without the need for garnishment. Since interests having priority in law over the execution would have to be satisfied from the proceeds before the judgment creditor was paid, the amount left over after the claims having priority were satisfied would represent the extent of the judgment debtor's interest, which is all the sheriff would have been able to sell in any event.

In this way, the proceeds of the judgment debtor's holdings would be diverted to the sheriff without removing the securities from the fungible mass needed for the orderly operation of the market.

(b) *Securities of Issuers Governed by the Canada Business Corporations Act and the Bank Act*

The procedure for recovery of the judgment debt from an account resembles garnishment more than conventional seizure. It involves the raising of a sum of money to answer a demand without requiring the seizure of specific assets held in the account.

What is actually seized is the judgment debtor's ability to deal with those assets. There would be no need for special treatment for securities issued by federally incorporated companies or banks, which are only capable of seizure as individual items by seizure of the security certificate.[36] In responding to a direction by the sheriff to recover the judgment debt from a seized account, an investment dealer could dispose of securities of federal companies and banks together with other securities as if carrying out a sell order from a client.

(c) Commission

A broker who is compelled to carry out a sale for the benefit of a judgment creditor should not be in any worse position than if the sale had been carried out at the client's order. The broker should be entitled to the normal commission for a sale of the same securities in the same quantity.

(d) Protecting an Investment Dealer Acting Under the Sheriff's Instructions

It would be impossible to obtain the co-operation of investment dealers in carrying out execution process if their assistance, given in good faith and carried out with reasonable care, left them liable in damages to their clients.[37] Investment dealers must be relieved of the liability which would arise if securities were sold off without the client's consent and the proceeds paid to someone else, other than in situations where it has been agreed that the investment dealer may do this.

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[36] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 74; *Bank Act*, R.S.C. 1985, c. B-1, s. 101. A paradox arises from the requirement to take possession of the security in order to complete a seizure, as these Acts do not require securities to be certificated. S. 49(1) of the CBCA merely entitles the holder "at his option" to a security certificate or to a non-transferable acknowledgment of the right to obtain one. If the securities of a CBCA company or a bank remain uncertificated, it is possible they can never be seized as individual items of property under a writ of execution. Could they be the subject of a charging order?

[37] A stockbroker is the agent of the client and is under a duty to act in the client's interests: *see R.H. Deacon & Co.* v. *Varga*, [1973] 1 O.R. 233, 239 (C.A.). The duty has sometimes been described as fiduciary in character. It is probably more correct to say that it corresponds to the general duty of an agent vis-a-vis a principal, occasionally giving rise to fiduciary obligations under certain circumstances. In particular, a broker has a duty to make full disclosure of all relevant facts where personal interest may conflict with that of the client: *see Glennie* v. *McD. & C. Holdings Ltd.*, [1935] S.C.R. 257. In certain transactions an investment dealer may act as a principal rather than as an agent. For instance, a purchase order may be filled by selling to the client a security from the dealer's own inventory. When this is done, the fact that the dealer is acting as principal must be disclosed to the client. Transactions of this kind are more common where bonds are concerned. Previously the term "investment dealer" was restricted to those who dealt as principals, and "stockbroker" used to refer to those dealing exclusively as agents, but most securities firms perform both roles nowadays: *Canadian Securities Course*, *supra*, n. 4 at 57.

Further protection is required, however. By leaving the actual realization to the investment dealer, the execution process allows room for the exercise of the investment dealer's market expertise in relation to questions such as the most advantageous timing of the sale and whether securities should be released onto the market in a block or in stages. Decisions taken in relation to questions like these may conflict with the wishes of the sheriff and the judgment creditor, who will naturally want as quick a realization as possible. For example:

> The price of common shares of ABC Ltd. is rising steadily. A judgment debtor holds a large quantity of those shares. The judgment debtor's account is seized. The investment dealer who has charge of the account fully expects the price trend to continue for some time in light of the recent profitability of ABC Ltd. The investment dealer is concerned that if a block of ABC Ltd. common shares is sold immediately, the rising market for those shares will collapse, the best price will not be obtained, and the value of the judgment debtor's holdings which are not needed to satisfy the judgment will be reduced. The investment dealer proposes selling the shares of ABC Ltd. in stages to prevent the collapse of the price trend and to maximize the recovery from the shares. The sheriff is being pressed by the judgment creditor to complete the execution.

Sometimes disputes such as these may have to be resolved by an application to the court from which the writ of execution was issued, but investment dealers should be able to exercise their professional judgment without fear of repercussions from either side. In return for the co-operation of investment dealers in the execution process, they should be be absolved of liability when acting in good faith and exercising reasonable care and skill in response to a direction by the sheriff to recover judgment debts from accounts under their control. This, of course, includes liability towards the sheriff and the judgment creditor.

4. VALUATION

Determining the acceptability of an offer is likely to remain a difficult problem in conducting an execution sale of securities.

While a price for listed, publicly traded securities is usually determinable by the stock or bond market at the time in question, the value of non-publicly traded securities may depend on a host of factors.[38] Extensive financial information concerning the issuer is required to determine a fair value for a security of a private company, and this may be difficult to obtain. Little cooperation may be given to the sheriff, particularly if the issuer is a small, closely-held corporation and the judgment debtor is one of the principals.

Many persons can be prejudiced to a substantial degree by a sale at an undervalued price. The judgment creditor is prejudiced because less of the judgment debt is realized from the sale than should be the case. The judgment debtor is prejudiced for the same reason. More property must be sold to satisfy the writ. The sheriff may be liable in damages to the judgment creditor for failing to obtain a reasonable amount from property under seizure. The issuer of the securities sold may be adversely affected if the sale occurs with too much publicity and the undervalued price becomes widely known. The other shareholders may be prejudiced because the value of their holdings may be lessened. This wide range of potential harm suggests that all interested parties should be able to come before the court to seek or give assistance in the determination of a reasonable value.

At the present time the *Rules of Court* allow the sheriff, the judgment creditor and the judgment debtor to apply to the Supreme Court for directions concerning the sale of property which has been taken in execution.[39] The application is made under the rule governing sales ordered directly by the court.[40] On an application under that rule, the Supreme Court is empowered to give directions for obtaining evidence as to the value of the property.[41] If the procedure outlined above is to function effectively, however, the circle of persons able to bring matters related to valuation before the court should include the investment dealer who may have to carry out a sale at the requirement of the sheriff and all others who may be directly affected by the sale, such as secured parties who have rights with respect to the securities in question. Since the price at which shares are sold influences the perception of the issuer in the investment market and the business community, the issuer and its shareholders may also be affected by an execution sale. The issuer, its officers and shareholders should be able to raise the matter of valuation before the court as well.

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[38] The judgment debtor's voting position may be one factor. A majority interest is naturally more valuable than a minority one. For an overview of the factors influencing the value of shares and the methodology of valuation, *see* V. Krishna, "Determining the "Fair Value" of Corporate Shares" (1987), 13 Can. Bus. L. J. 132. Even in the case of publicly listed shares, the market price is not considered to be the governing factor in determining the value of shares in all circumstances: *ibid.*, 156-157.

[39] *Supreme Court Rules*, R. 42(22). It is not clear whether R. 42(22) prevents other potential applicants from seeking this relief.

[40] *Ibid.*, R. 43.

5. The Standard Of Propriety Governing The Disposition: Commercial Reasonableness

(a) General

The common law duty of the sheriff was to sell property that had been seized under a writ within a reasonable time for a reasonable price, and to conduct the sale in a manner that allowed a reasonable price to be obtained.[42] Recent legislation dealing with creditors' default remedies has tended to use commercial reasonableness as a standard to govern the propriety of a sale of an asset to satisfy a debt. The phrase "commercial reasonableness" stems from the *Uniform Commercial Code*,[43] a model on which the commercial laws of most U.S. states are based. It has spread from there to modern Canadian personal property security legislation. In British Columbia, the recently enacted *Personal Property Security Act* applies this standard to the exercise of all rights and obligations arising under the Act, including the default remedies of secured parties.[44]

The similarities between a sale under a writ of execution and extrajudicial seizure and sale by secured parties to satisfy an unpaid debt make it reasonable to apply the same standard to both. Securities are instruments for financing business enterprises and exercising ownership rights in them. As such, securities are an intrinsically "commercial" kind of property. The market for securities is both more complex and volatile than the market for most other kinds of personal property seized under execution process. The words "commercial reasonableness" do not detract from the sheriff's common law duty to obtain a reasonable price, but the adjective "commercial" would signal to those carrying out a disposition a certain need to be aware of the factors which influence the securities market. It would probably not be inappropriate to make commercial reasonableness the standard to be applied to all execution sales. We conclude it should be applied at least to the disposition of seized securities and accounts.

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[41] *Ibid.*, R. 43(4)(g).
[42] Dunlop, *Creditor-Debtor Law in Canada* (1981) 399; 17 Hals. (4th) para. 493.
[43] S. 9-504(3).
[44] S.B.C. 1989, c. 36, s. 68(2).

(b) Application of the Standard

In some of the responses to the Working Paper, the Commission was urged to define what is meant by commercial reasonableness. In our view, however, over-precise definition should be avoided, because it might remove the flexibility needed to apply the standard to the facts of individual cases as they arise. Those who drafted Article 9 of the *Uniform Commercial Code* left "commercial reasonableness" undefined for that reason.[45] They did indicate, however, that the standard was to apply to all aspects of the disposition, including the timing, the method, the place and the terms.[46]

Factors such as time and place may be especially relevant to a sale of securities, since the market often fluctuates from day to day and price may differ on different exchanges.[47] The method of sale may be significant as well. Selling a large block of identical securities on the same exchange may drive the price down, for example, but selling smaller blocks in stages over a period of time may be equally imprudent if the market shows a steady decline. Public auction may result in a better price for the shares of a private company, but under other circumstances a private sale to another shareholder may realize a better price, since that purchaser may be willing to pay a premium to obtain control. Both public and private sales may be commercially reasonable, depending on the circumstances.

Since factors like these influence the sale of securities so greatly, it is worthwhile to follow the example of the *Uniform*

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[45] Gilmore, "Article 9 of the Uniform Commercial Code – Part V," (1952) 7 Pers. Fin. L. Q. Rep 4, 8.

[46] S. 9-504(3).

[47] Differences in price between exchanges make arbitrage possible.

Commercial Code by clarifying that the standard of commercial reasonableness relates to all aspects of a disposition.

(c) Dispositions on the Open Market

Creating a flexible standard like commercial reasonableness for judging the propriety of an execution sale has considerable advantages, but also a drawback in that it may leave room for unproductive disputes between the judgment debtor, the judgment creditor, and the sheriff. These disputes may prolong execution proceedings and occupy court time unnecessarily. Dispositions which conform to normal business practices under open market conditions should not be open to attack. If it were otherwise, the possibilities for dispute would be endless.

In relation to securities, a disposition conforming to normal business practices under open market conditions translates into a sale on a recognized exchange. Such a disposition should be presumed to be commercially reasonable, unless the person attacking it can produce evidence to the contrary.[48] Once a court has approved a particular disposition, either before or after it is made, there should be no room for further attack.[49]

E. Miscellaneous Issues

1. PRIORITIES BETWEEN A JUDGMENT CREDITOR OR PURCHASER FROM THE SHERIFF AND A PURCHASER FROM THE JUDGMENT DEBTOR

(a) Certificated Securities

Who should prevail where a judgment creditor has validly seized a security by service of notice and, after the seizure but without knowledge of it, someone purchases the security from the judgment debtor and acquires possession of the security certificate? Under the present law, the contest would likely be resolved in favour of the judgment creditor. Section 59(2) of the *Court Order Enforcement Act* purports to invalidate all transfers after notice of seizure has been served. It appears to be immaterial whether or not the judgment debtor or the transferee is aware of the seizure.[50]

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[48] American courts have tended to hold a sale on a recognized stock exchange to be commercially reasonable: *see Marine Midland Bank-Rochester* v. *Vaeth*, (1976) 388 N.Y.S. 2d 548; *Lamb Brothers, Inc.* v. *First State Bank*, (1979) 589 P. 2d 1094.

[49] The approval of a disposition by a court would be subject to appeal like other judgments and orders. It could also be set aside if it was obtained by fraud, of course.

Under the changes proposed in this Report, contests between a judgment creditor or purchaser from the sheriff on one hand and a holder of the security certificate on the other would be rare, since seizure of a certificated security carried out by notice alone would be limited to cases where the security was held by a bailee or formed part of an account with an investment dealer.

Once a notice of seizure was served, a bailee holding a security would be prohibited from delivering the security certificate to anyone else. If the sheriff did not obtain possession of the certificate when seizing the security, it would likely be due to the bailee's assertion of a right to retain it against both the sheriff and the judgment debtor.

In the case of a certificated security forming part of an account, the certificate would most likely have been turned over to the investment dealer. Having been served with a notice of seizure of the account, the investment dealer would be prohibited from allowing the judgment debtor to withdraw the security certificate. Thus, the judgment debtor would be unable to deliver it to an innocent purchaser. In any event, security certificates held by investment dealers on behalf of clients would usually be in "street form" or registered in the name of a depository or its nominee. There would seldom be any certificate under the investment dealer's control specifically identifying the judgment debtor as the owner.

It would be most unlikely, therefore, that a security certificate would come into the hands of a purchaser buying in good faith, without knowledge of the seizure. If through some unusual circumstance it did, however, and a priority contest arose between the holder and the sheriff or anyone buying the security under the writ, there would be good reasons for giving priority to the holder of the security certificate. Allowing the certificate holder to prevail would give certainty to dealings with security certificates and would be in keeping with the general understanding that the underlying rights they represent are transferable by delivery.

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[50] *See R. in Right of British Columbia* v. *Yu, supra*, n. 12. Until the point of seizure, the judgment debtor can pass good title to the security. Where the reach of the writ of *fieri facias* has been extended by statute, the sheriff obtains no interest in the property which the statute makes exigible until actual seizure: *Hatch* v. *Rowland*, (1870) 5 P.R. 223, 224.

One objection to such a priority rule might be that it could have a negative effect on the price offered at a sheriff's sale, since potential purchasers would know they could lose a priority contest with the holder of the certificate. The rule might have the opposite effect if the certificate was in the sheriff's hands, however. Prospective purchasers at an execution sale would be reassured by its availability and would be more likely to offer a higher price.

A certificate in street form may continue to show the judgment debtor as the owner even though the judgment debtor has no further beneficial interest in the underlying security. Such a certificate may have to be used by an investment dealer to complete a trade on behalf of other persons. The party receiving the certificate could have confidence in the transaction if a rule giving priority to the certificate holder existed.

Perhaps most importantly, the *Personal Property Security Act* subordinates a perfected security interest in certain kinds of collateral, including securities, to the title of a purchaser who gives value for the security without knowledge of the security interest, and takes possession of the security or is recorded as the transferee.[51] This section of the Act recognizes the commercial reality that securities are bought and sold in a fast-moving market and are virtually considered to be negotiable instruments. It is important that a purchaser have confidence in their transferability without having to be concerned with the possibility that third party interests may exist. For the sake of consistency as well as for the other reasons stated above, execution law should give priority to a purchaser in similar circumstances. We conclude that anyone purchasing a security in good faith, without knowledge of a seizure of the security or of an account in which it is held, and who acquires possession of the security certificate, should have priority over the sheriff and anyone purchasing from the sheriff.

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[51] S. 31(3), as repealed and substituted by S.B.C. 1990, c. 25, s. 56.

(b) Uncertificated Securities

A priority contest between the purchaser of an uncertificated security under an execution sale and a purchaser from the judgment debtor would be very rare. Seizure would have been carried out by serving notice on the issuer or bailee. An issuer should not record anyone as the owner after the notice was served except someone purchasing through the sheriff.[52] The bailee should not relinquish rights over the security to the judgment debtor after being served with a notice of seizure. The policy of giving certainty to dealings with securities, however, dictates that the same priority rule should apply as in the case of certificated securities. The innocent purchaser should prevail over the execution.

2. THE RELATIONSHIP BETWEEN SECTION 52 OF THE COURT ORDER ENFORCEMENT ACT AND THE PROVISIONS GOVERNING EXECUTION AGAINST SECURITIES

Despite *Re Patmore*,[53] it is unlikely that section 52 of the *Court Order Enforcement Act* was ever intended to apply to equity shares. It originated in the *Judgments Act, 1838*,[54] and made money, banknotes and negotiable instruments exigible for the first time, while a different section of the same Act made shares exigible by way of charging order. In British Columbia, however, the relationship between sections 52 and 58 of the *Court Order Enforcement Act* has become confused and it is time to disengage the two provisions.

Amendments along the lines of the draft legislation in this Report would apply to certificated shares which, on the authority of *Re Patmore*[55] and *The Queen in Right of British Columbia* v. *Yu*,[56] are exigible under section 52. They would also cover bonds which are issued as part of a divisible series of debt instruments for sale to the public. A consequential amendment, taking the kinds of property covered by the new legislation out of the scope of section 52, is therefore justified.[57]

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[52] An unusual case might arise in which a person ignorant of the seizure takes a transfer of a security from the judgment debtor for value in good faith and is later recorded as the owner or transferee through inadvertence or, possibly, through some collusion between the issuer and the judgment debtor in which the purchaser was not involved. The nature of the recording that will confer priority over the execution will differ, depending on the setting in which the security is transferred by the judgment debtor. If it is in the non-market setting, ownership will be registered by the issuer or the issuer's transfer agent. If it is acquired in the market setting, the transfer would likely be recorded by a clearing agency only as a transfer to an investment dealer acting on behalf of the purchaser. If daily trades are netted by the clearing agency, it may be very difficult to show afterward that a particular trade related to a sale on behalf of a particular beneficial owner.

[53] *Supra*, n. 10.

[54] 1 & 2 Vict., c. 110.

[55] *Supra*, n. 10.

[56] *Supra*, n. 12.

3. CHARGING ORDERS

Reform of the procedures for execution against securities by writ raises the question as to whether there is any need to retain the charging order under the *Judgments Acts, 1838 and 1840*[58] as an available remedy.

While the procedure for obtaining the order is seldom used, there does not appear to be a pressing need to abolish the remedy. Abolition has been urged at various times on the grounds that the charging order is superfluous and that it may give an unjustified priority over judgment creditors proceeding in the ordinary way by writ of execution.

Our approach to repeal of the provisions of the *Judgments Acts* creating the charging order is one of caution. There is no purpose in abolishing one of the relatively few avenues available to recover a judgment debt if it might prove useful to a creditor at some point. It is reasonably clear that a charging order does not give the judgment creditor obtaining it a preferential status over other judgment creditors in a bankruptcy.[59] Future cases may lead us to reconsider the retention of this older remedy, but for the time being we do not recommend its abolition.

4. LIABILITY OF THE SHERIFF

Certain pitfalls exist for the sheriff in the execution process. Sheriffs have traditionally been held liable in damages if they fail to seize exigible property. They commit a trespass if they seize assets which are in fact owned by someone other than the judgment debtor.[60] They may also be liable for selling seized property at an unreasonably low value, or for conducting a sale in a way which prevents a reasonable price from being obtained.[61]

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[57] True hybrids such as a series of identical promissory notes sold to the public as a means of raising capital may still be exigible under both s. 52 and the draft legislation, but this should not produce difficulty. Exigibility under both s. 52 or the draft legislation would mean that the procedure under either could be used. The draft legislation would allow for the sale of the notes. In contrast, s. 52 requires the sheriff to wait until the notes mature and then sue for the principal and interest due.

[58] 1 & 2 Vict., c. 110; 3 & 4 Vict., c. 82.

[59] *Re Overseas Aviation Engineering (G.B.) Ltd.*, [1963] Ch. 24 (C.A.). *See also Re Bonnycastle*, (1987) 16 B.C.L.R. (2d) 220 (S.C.). The latter case pertained to an equitable charging order, but the principles applied there to find that a charging order does not give preferential status over other creditors would seem to be applicable to the statutory kind of charging order as well.

[60] Turriff and Edinger, *The Office of the Sheriff* (Study Paper for the Law Reform Commission of British Columbia) (1983) 179.

The pitfalls are more evident where securities are concerned. Valuation of shares of private companies is a very complex matter on which expert opinions may differ substantially. On the other hand, the value of publicly traded securities may be more easily determinable but subject to abrupt change. These circumstances may make the reasonableness of an offered price a highly debatable question, and a sale of either kind of security may readily be challenged. The problem of valuation arises in relation to seizure as well as disposition, since the sheriff may be in doubt as to the proper quantity of securities to seize in order to raise the amount needed to cover the judgment debt. Excessive seizure can bring about liability towards the judgment debtor.[62]

As securities are often held in the names of persons other than their beneficial owner for a variety of reasons, there is a greater chance of a wrongful seizure when an execution is carried out against this kind of property than when other kinds of assets are seized. A judgment debtor may hold shares only as a nominee, for example. Or, the judgment debtor may be shown as the owner of the underlying shares on a share certificate even though having ceased to have any beneficial interest. If those shares were seized because the judgment debtor was the ostensible owner, the sheriff would be liable to the true owner for their value.

Sheriffs might be excused for declining to proceed against securities without receiving sufficient assurance of indemnity. A judgment creditor could be required to provide an adequate bond or at least an undertaking to indemnify the sheriff as a precondition to a seizure of securities, but the uncertainty surrounding the amount of the sheriff's potential liability could give rise to demands for bonds in excessive amounts. This might tend to immunize securities as a class of property from execution, which would obviously be undesirable.

It seems advisable for reasons of both fairness and practicality to provide that the sheriff be entitled to indemnity from the judgment creditor against liability arising from the seizure and disposition of securities under a writ of execution, if the sheriff has exercised good faith and reasonable care.[63]

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[61] *Fair and Co. and Livingston* v. *Wardstrom*, (1919) 47 D.L.R. 16 (Alta. S.C., App. Div.).

[62] *Moore* v. *Lambeth County Court Registrar*, [1970] 1 All E.R. 980 (C.A.); *Mandelin* v. *Stan Reynolds Auto Sales Ltd.*, (1961) 31 D.L.R. (2d) 697, 698 (Alta. S.C.).

The mere existence of such an obligation may not be enough in all cases to protect the sheriff. If there is any doubt about the ability of the judgment creditor to fulfil the obligation to indemnify, a court should have the power, on application by either the sheriff or the judgment creditor, to set the terms of the indemnity. This could extend to an order requiring the judgment creditor to give a bond for a particular amount or secure the sheriff's potential liability in some other manner.

F. Procedure

1. GENERAL

A number of matters which touch on procedure in the courts have already been discussed. This part of the Report is concerned with the means by which interested parties can bring questions and disputes arising in connection with executions against securities before a court and the powers which the court will need to resolve them.

Among the issues which the court may be asked to address are these:

(a) whether a seizure is valid;

(b) whether a proposed disposition of a security is commercially reasonable;

(c) how the proceeds of seized securities should be distributed among various claimants;

(d) whether a bailee is justified in refusing to comply with a demand by the sheriff to relinquish possession of securities;

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[63] There is some judicial support for the view that the sheriff has a right of action against the judgment creditor for indemnity from claims arising from an execution, apart from statute: *Sheffield Corporation* v. *Barclay*, [1905] A.C. 392, 399 (H.L.); *Mandelin* v. *Stan Reynolds Auto Sales Ltd.*, *supra*, n. 62 at 700-701. This may depend, however, on whether the sheriff acts on specific directions from the judgment creditor as to the seizure of particular assets. *See Collins* v. *Evans*, (1844) 5 Q.B. 804, 829, 114 E.R. 1453, 1462, commenting on *Humphrys* v. *Pratt*, (1831) 5 Bli. (N.S.) 154, 5 E.R. 269 (Ex. Ch.).

(e) whether a particular item is a "security" for the purposes of the *Court Order Enforcement Act* or falls within some other part of the Act;

(f) whether a person ought to be restrained from transferring or otherwise dealing with a seized security or account;

(g) whether a transfer limitation should affect the manner in which a seized security is disposed of;

(h) whether the interests of both the judgment debtor and judgment creditor would be best served by delaying a disposition even though the judgment creditor wants some portion of the judgment debt to be recovered immediately;

(i) whether a seizure should be discharged because the detriment to third parties from the seizure would outweigh its benefit to the judgment creditor.

2. PERSONS ABLE TO APPLY TO THE COURT

It is possible to see even from the short list of issues above that the circle of persons whose interests may be affected by an execution against securities is potentially wide. A bailee, a secured party, and an investment dealer, for example, may have as much need to seek the assistance or guidance of the court as the sheriff, the judgment creditor and the judgment debtor. There should be a way in which any person whose interests are directly affected by an execution against securities can be heard by the court.

The *Court Order Enforcement Act* provides expressly for third parties to be heard in connection with garnishment[64] of debts and sale of land,[65] but not in connection with execution against shares or other securities. Questions of ownership of securities and entitlement to proceeds could be determined in interpleader proceedings, but it is unlikely that all of the kinds of issues which could arise under the execution process proposed in this Chapter could be resolved through the use of this procedure.[66] Special provisions for applications to the court are required.

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[64] *Court Order Enforcement Act*, ss. 18, 19, 20, 21.

[65] *Ibid.*, s. 84, 86(5).

The best way to ensure that the assistance and guidance of the court is accessible to all who may require it is to allow applications to be made by any person who has an interest in a security or account that is the subject of an execution, or who may be directly affected by the seizure and disposition. The draft legislation included in this Report contains such a provision.[67]

3. POWERS OF THE COURT

(a) General

For the court to effectively exercise its supervisory jurisdiction over the conduct of the execution process insofar as securities are concerned, it must have access to a wide range of discretionary powers. Unless this authority is provided in wide terms, there is a danger that the scope of the jurisdiction will be whittled down by argument and interpretation. The complex and volatile nature of the securities market requires the exercise of care to ensure that a disposition of seized securities takes into account the positions of the judgment debtor and third parties as well as that of the judgment creditor. The legislation must allow flexible responses to intricate situations.

(b) Information Concerning Value

It would be futile in many, if not most, cases for the court to launch into an inquiry as to the value of non-publicly traded securities without financial information concerning the issuer. This information may not be in the hands of the parties actually before the court. To enable a proper valuation, the court should have the power to compel an issuer to provide the information required under appropriate restrictions on its use to maintain confidentiality.[68]

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[66] R. 48 of the *Rules of Court* contemplates interpleader proceedings. It permits anyone making a claim to or in respect of property which the sheriff has taken or intends to take in execution to deliver a notice of the claim to the sheriff. If the judgment creditor disputes the claim, the sheriff may apply for interpleader relief. The court then determines the rights of the parties with respect to the property, and may add additional claimants to the proceeding. While interpleader provides a forum for determining the state of the title to seized assets, it is doubtful whether it allows for a wider range of issues, such as valuation or the commercial reasonableness of a proposed disposition of securities, to be dealt with effectively.

[67] *Infra*, Chapter IV, draft legislation, s. 123.

[68] Only British Columbia corporations and other issuers whose central management is located in the Province could be ordered to supply information regarding value, however, as the court's power to compel the production of evidence is limited by its territorial jurisdiction.

(c) Orders Restraining Transfers and Other Dealings Intended to Evade Execution

The reforms proposed in this Chapter would occasionally allow seizure without a change in the possession or control of securities and accounts by third parties. While this allows greater protection to the genuine pre-existing rights of third parties, it may leave room for collusion to defeat or delay a judgment creditor. Fraudulent pledges and transfers are a possibility. It may be useful for sheriffs and judgment creditors to have an expedient remedy akin to injunction to restrain them, but which involves less procedural formality than is needed to obtain an injunction.

Sheriffs and judgment creditors should be able to apply to the court which issued the writ of execution for an order restraining a transfer or dealing with a seized security or account which is apparently intended to cause prejudice to the judgment creditor.

(d) Liquidation of an Issuer

Consider the following examples:

> A, a judgment debtor, is the sole shareholder of a holding company which has numerous valuable assets. A's shares in the holding company are his major personal asset. The shares are seized under a writ of execution, but when the sheriff attempts to sell them no bids are received, since the holding company has no public profile.

> A, B, and C are related and are the sole shareholders of a numbered company which owns several parcels of land. The land has considerable value. A judgment is obtained against C. C's shares in the holding company are seized and the sheriff attempts to sell them but the only bids received are those of A and B, who have colluded to present bids that are much lower than the real value of the shares.

> A, a judgment debtor, is a shareholder in a small company. A's shares in the company are seized by the sheriff, who attempts to sell them by public tender. The spouse of the judgment creditor presents a bid for all 2000 shares of A. A's fellow shareholder presents a bid for only one share, but it is almost half the amount of the other bid. In light of this disparity, the sheriff refuses to proceed with the sale. The judgment creditor asks the court to order the sheriff to complete a sale, but the sheriff's refusal is upheld by the court.[69]

In these scenarios, A's wealth is concentrated in assets which are beyond the reach of the judgment creditor because a company has been interposed. The law considers the company to be a separate person.[70] Its property is not the property of its shareholders. The shares representing A's economic (but not legal) interest in the corporate assets are not marketable because of the closed, private nature of the company, and so the judgment against A remains largely, if not completely, unsatisfied. The injustice of this type of situation is readily apparent.

A's wealth could be reached if the corporation were liquidated, however. The proceeds of the liquidation would be distributable among its shareholders (after payment of the corporation's creditors) and A's portion of the proceeds would then be subject to execution or garnishment. The power to order liquidation of a company with assets in which a judgment debtor's wealth has been concentrated would remove one method of becoming "judgment-proof."

Liquidation would be an extreme solution, of course. The threat of possible liquidation, however, might be a strong deterrent to collusive behaviour designed to thwart judgment creditors. Recovery under a judgment would occur more frequently. We conclude that a discretion to order liquidation of an issuer should be added to the catalogue of the court's powers. This discretion must be limited for constitutional reasons to issuers formed under the laws of British Columbia.

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[69] This scenario corresponds to the facts of *A.A.C.R. Enterprises Ltd.* v. *Grimwood*, (1984) 51 B.C.L.R. 13 (S.C.).

[70] *Salomon* v. *Salomon & Co.*, [1897] A.C. 22 (H.L.).

(e) Power to Make Orders When Not All Interested Persons are Before the Court

It is usually desirable for all the persons who could potentially be affected by a court order to have had an opportunity to be heard in the proceeding in which the order is made. For this reason courts normally insist that all interested parties be served with notice of an application. It may not always be necessary to give notice to every person who might conceivably be affected in some manner, however.

An issuer may be "affected" by a seizure and disposition of securities if its transfer agent is required to record someone as owner who buys the securities from the sheriff, but the purchaser might be one of thousands of shareholders. The issuer is "affected" only in a very remote sense. It may be otherwise if the issuer was a private company with two shareholders.

To avoid confining the court unduly in the exercise of its powers, the court should be able to make an order in relation to an execution against securities whether or not all interested persons have had notice of the proceeding.[71] Again, the courts can be expected to exercise with care their discretion to dispense with notice to interested persons.

(f) Power to Discharge a Seizure Before Payment of the Judgment Debt

A judgment debtor or judgment creditor may agree that a seizure of certain securities or an account should be discharged. This could happen, for instance, if the judgment debtor offers to substitute other assets for the securities. Indeed, the seizure of an entire account might serve as a powerful inducement to pay off a judgment in full. The court should be able to set aside a seizure on the consent of the parties without having to set aside the writ.

There may also be cases in which the value of a judgment debtor's interest in a security is so small in relation to others in the same property that the balance of convenience favours releasing the seizure. This may be particularly true if several persons have an interest in the same certificated security. The prejudice suffered by the judgment creditor in having to pursue other assets may be greatly outweighed by the prejudice to other persons resulting from the immobilization of the certificate. A seizure would likely be discharged prior to satisfaction of the judgment debt only if other assets were available to the judgment creditor, however.

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[71] A provision similar to this is found in R. 43(2) of the *Rules of Court*, dealing with the sale of property in an action by a debentureholder.

(g) Transfer of Specific Securities from a Seized Account to the Sheriff

Occasionally, a judgment creditor or judgment debtor may find it advantageous for particular securities to be removed from a seized account and placed in the custody of the sheriff rather than having the assets in the account sold by the investment dealer. For example, a block of securities owned by the judgment debtor may have a known and relatively stable value. The judgment creditor may wish to have these sold by the sheriff if it appears to be reasonably certain that the block will realize a particular amount. A judgment debtor may also agree to a transfer of specific securities to the sheriff in order to free the rest of the account. Seizure of the account may often result in voluntary payment of the judgment in this manner.

Since the removal of specific securities from a seized account would be a departure from the standard procedure for execution against securities in the market setting and would affect the investment dealer's trading operations to some degree, the court's approval should be required. If the parties agree to the procedure, a consent order could be obtained.

(h) Costs and Expenses

Persons unconnected with the original litigation who become involved in the execution process involuntarily should not be forced to incur loss in order to benefit the judgment creditor. The court should be empowered, in its discretion, to award costs and expenses to these other persons in proper cases. This power may exist already as part of the inherent jurisdiction of the Supreme Court with respect to costs,[72] but it should be put beyond doubt.

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[72] R. 57(16) contains an implication that the court has the inherent power to direct payment of costs out of "an estate or property," which could, arguably, extend to the liquidated estate of a judgment debtor in an item of personal property seized and sold under a writ of execution. *See also In re the Judgment Acts; Hood, Aldridge & Co.* v. *Tyson*, (1902) 9 B.C.R. 233 (S.C.).

G. Summary

In this Chapter we have described a comprehensive framework for execution against securities to replace the archaic provisions in sections 57 to 63 of the *Court Order Enforcement Act*.

A statutory definition of the term "security" was developed comprising not only shares, bonds and debentures, but also extending to the many other kinds of interests traded on modern securities exchanges and markets. It extends to an interest in a fungible mass of securities in order that an execution will be effective even when no specific securities belonging to the judgment debtor can be identified in a commingled inventory, a situation likely to arise if the securities have been placed with an investment dealer for trading.

Seizure and disposition of securities under a writ of execution can be considered in two contexts: the non-market setting and the market setting. In the non-market setting, the securities are held by the judgment debtor personally or by a custodian or nominee on behalf of the judgment debtor. They may also be held by a secured party to whom the securities have been pledged as collateral. In the market setting, the securities are held in an account with an investment dealer. The non-market setting is characterized by static possession, the market setting by transitory control of a volume of securities evidenced by accounting entries. Different circumstances in each setting lead to different methods of seizure and disposition.

In the non-market setting, seizure of certificated securities should be carried out by taking possession of the certificates. It is important to acquire the certificate in order to prevent dealings which give rise to priority contests. When a contest does arise between a purchaser who has acquired the certificate in good faith with no knowledge of the seizure and another who has purchased from the sheriff, however, the holder of the certificate should have priority. This rule accords with commercial practice and would provide certainty in transactions involving securities.

If the certificate is in the hands of a bailee and loss of possession would impair a valid third party interest, the bailee should be able to refuse to surrender it, provided that an application is made to the court to determine the validity of the interest and for guidance as to how the interests of the judgment creditor and the third party are to be reconciled in the execution process.

If the securities are uncertificated, they must be seized by notice of the seizure, which should be served on the issuer, the issuer's transfer agent, or the bailee, if any.

When securities have been seized in the non-market setting, the sheriff should have the ability to dispose of them either by public tender or private sale. If the securities are subject to a transfer limitation, the insiders of the issuer, and the issuer itself, should have the opportunity to acquire them before they are offered to the public.

Seizure in the market setting is to focus on the judgment debtor's account in order to minimize the disruption of the market and risk of loss to third parties which may result from removal of securities from the fungible mass needed for trading. Service of a notice of seizure on the investment dealer would prevent access to the account by the judgment debtor. Realization of the judgment debt would be very simple. The investment dealer would be directed to sell from the account and divert the proceeds to the sheriff, together with other funds credited to the judgment debtor's account, until the judgment was satisfied.

These modes of seizure and disposition would apply to bonds and debentures which are intended for public distribution and trading. Such debt obligations would no longer be subject to section 52 of the *Court Order Enforcement Act*.

This reform of execution law as it relates to securities requires that courts have certain procedural powers, which should be conferred by the implementing legislation. Draft legislation is contained in the following Chapter.

CHAPTER IV DRAFT LEGISLATION

A. Introduction

In the previous Chapters, the deficiencies of sections 57 to 63 of the *Court Order Enforcement Act* in the present-day context were examined at length. A need for a modern legal framework to replace those provisions has been shown. This Chapter sets out draft legislation intended to provide that framework.

B. Recommendation

The Commission recommends that: The Court Order Enforcement Act *be amended by the enactment of legislation similar to that contained in this Chapter.*

C. Draft Legislation

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of British Columbia, enacts as follows:

1. The *Court Order Enforcement Act* is amended by:

(a) renumbering section 52 as subsection 52(1) and adding a new subsection (2) as follows:

(2) Subsection (1) does not apply to anything which may be seized under Part 4.

Equity shares, warrants, options, and money market instruments, which are part of a divisible series intended for public distribution, are intended to be exigible by writ of execution only under Part 4. The present s. 52 contains a reference to "bonds, specialties or other securities for money." The reference to "bonds" and "securities for money" is confusing in this context. The purpose of adding subs. (2) is to clarify that anything meeting the definition of "security" under the new Part 4 is not to be considered exigible under s. 52.

(b) repealing sections 57-63; and

The existing sections dealing with exigibility of shares are to be repealed.

(c) adding a new Part 4 as follows:

Part 4

Seizure and Sale of Securities

110. (1) In this Part,

"This Part" is the new Part 4.

"account" means the rights and interest of a judgment debtor in an account controlled by an investment dealer in which securities, money or other property is held or carried for or to the credit of a judgment debtor and includes an arrangement under which an investment dealer holds securities for safekeeping;

The definition of "account" refers to the property held or carried for a client by a brokerage house or firm of investment dealers. It is customary in the securities industry to speak of a client's "account."

"bailee" means a person other than the beneficial owner of a security who has possession or control of the security and includes a bailee, trustee, stakeholder, escrow agent or secured party, but does not include

(a) an investment dealer,

(b) a clearing agency, or

(c) a nominee of a clearing agency;

The term "bailee" is adopted to refer to a person other than the beneficial owner of a security who has possession or control of the security or the security certificate. The term is not restricted to a mere custodian or nominee. Examples of a "bailee" would be an escrow agent who has custody of securities until certain conditions for their release are met, or a secured party holding securities as collateral.

Investment dealers are excluded from the definition because a special procedure is provided in s. 117 for execution against a judgment debtor's account.

Clearing agencies and depositories for security certificates are not usually aware of the beneficial ownership of the securities which they handle and so are not able to fulfil the role which Part 4 assigns to a bailee. They are excluded from the definition for this reason.

"clearing agency" means a person that

(a) in connection with trades in securities, acts as an intermediary in paying funds, in delivering securities or in doing both of those things,

(b) provides centralized facilities through which trades in securities or exchange contracts are cleared, or

(c) provides centralized facilities as a depository for securities;

Self-explanatory.

"incorporation document" means an Act, a statute of a jurisdiction other than the Province, or a document available for public inspection

(a) under which a corporation is legally constituted or which evidences its incorporation, or

(b) which regulates the internal affairs of the corporation or that of its shareholders;

This definition refers to Acts of the Legislature, statutes of Canada, another province or a foreign country, and public documents relating to the formation of corporations and the conduct of their internal affairs. It is relevant to the definition of "transfer limitation." If a transfer limitation is contained in an incorporation document, a seized security that is affected by it is to be disposed of under s. 116 rather than s. 115.

The term "corporation," which is used throughout Part 4, is not defined in section 110. (Compare *Court Order Enforcement Act*, s. 57, Appendix A.) The definition in the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29 therefore applies:

> "corporation" means an incorporated association, company, society, municipality or other incorporated body where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor.

The definition includes corporations formed outside British Columbia, which are required by the *Company Act*, s. 323(2) to file copies of their charters when registering to do business in the Province.

"investment dealer" means a person who engages in the business of trading in securities on behalf of other persons and includes a broker, securities dealer, or firm of investment dealers, but does not include a clearing agency or its nominee;

This definition is connected with that of "account." It is significant in relation to the procedure under s. 117 for execution against a judgment debtor's account with an investment dealer.

"issuer" means the person, corporation, authority, or a partnership or group of persons, corporations or authorities that issues a security or the successors of that person, corporation, authority, partnership or group;

An issuer will usually be the corporation which issued the shares or debt obligations belonging to a judgment debtor. The legislation allows service of a notice of seizure and writ of execution on the issuer in the case of uncertificated securities, and imposes certain duties on the issuer to withhold payments related to securities from the judgment debtor once notice of seizure has been served.

"local issuer" means

(a) an issuer formed under the laws of the Province, or

(b) an issuer formed under the laws of Canada which has its head office in the Province;

Some features of Part 4 require that the issuer do certain things or be subject to certain orders. Not all issuers are equally amenable to the jurisdiction of the B.C. courts and for certain purposes it is necessary to distinguish between those that are and those that are not. The purpose of this definition is to draw that distinction.

"purchaser" means a person who acquires an interest in a security through sale, mortgage, pledge, lien, assignment or delivery;

"Purchaser" has an extended definition, including a person who acquires an interest in a security through several means other than sale. It covers a mortgagee and a holder who has taken delivery of bearer securities, for example.

"secured party" has the same meaning as in the *Personal Property Security Act*;

The legislation recognizes the rights of a secured party with respect to securities that form collateral under the PPSA. The definition ensures that the use of the term in this legislation is consistent with its use in the PPSA.

"security" means

(a) a share, stock, warrant, bond, debenture or similar instrument, whether or not represented by a security certificate, that

(i) is recognized in the jurisdiction in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or that evidences an obligation of the issuer,

(ii) is one of a class or series or is by its terms divisible into a class or series of instruments, and

(iii) in the ordinary course of business is transferred

(A) by delivery with the necessary endorsement, assignment or registration in the records of the issuer or of an agent of the issuer, or by compliance with restrictions on transfer, or

(B) by an entry in the records of a clearing agency,

(b) any right, interest or obligation, whether or not represented by a certificate, commonly traded on securities exchanges or markets, or

(c) a beneficial or other interest in, or portion of, anything described in paragraphs (a) or (b) or in a fungible mass of securities;

The definition of "security" is crucial since it controls the scope of Part 4. It corresponds closely to the definition of "security" in the *Personal Property Security Act* (as amended by the *Securities Amendment Act, 1990*), which prescribes rules for determining priority in various kinds of collateral, including securities, between secured creditors and judgment creditors.

As the definition refers to warrants, etc., that evidence an obligation, it covers commonly traded items such as share warrants and options. These, if exercised, require the issuer or grantor to issue shares to the holder in accordance with the terms of the obligation. The term "security" extends to bonds, debentures and other debt instruments if they are part of a divisible series. Bonds and debentures which are simply evidence of an obligation owed to a single creditor or a defined group of creditors, rather than being part of a series intended for public distribution, would continue to be exigible under s. 52 of the *Court Order Enforcement Act*. The definition also covers items normally traded on securities exchanges and markets, attempting to cover all the various kinds of rights and interests commonly understood to be "securities."

The definition is used as a vehicle to clarify that beneficial and partial interests in securities, or in a fungible mass of securities, are exigible. Often a judgment debtor's interest in a security will be encumbered. A judgment creditor should still be able to attach the judgment debtor's interest to the extent that it is unencumbered.

"security certificate" means a document representing a security;

Self-explanatory.

"sheriff" includes a court bailiff;

The *Sheriff Act* permits duly appointed court bailiffs to carry out execution process. This definition makes it clear that the use of the term "sheriff" in this legislation includes court bailiffs carrying out that aspect of the sheriff's duties.

"transfer agent" means a person carrying on business in British Columbia who is appointed by an issuer to

(a) maintain records of the ownership of securities issued by that issuer;

(b) prepare, issue and cancel security certificates in respect of those securities; or

(c) record transfers of the ownership of those securities,

and includes an office or branch of the issuer located in the Province at which the functions described in paragraphs (a), (b) or (c) are carried out;

An issuer of securities will often appoint a transfer agent to maintain a share register and record transfers of the issuer's securities. A transfer agent will usually be a trust company. This legislation provides that, for certain purposes, notices may be served either on the issuer or the issuer's transfer agent.

"transfer limitation" means a stipulation in

(a) an incorporation document; or

(b) an agreement, entered into before the date of judgment, which is binding on the judgment debtor,

whereby

(c) the consent of a person other than a party to the transfer of a security is a condition precedent to the effectiveness of the transfer or to the registration of the transfer; or

(d) a specified person or group has an option, a pre-emptive right, a right of first refusal, or an obligation, to purchase a security;

Many securities are subject to certain restraints on their transferability. These restraints may be imposed by the terms on which the issuer is incorporated, by bylaws or regulations of the issuer, or by agreement between holders of the security.

The kind of stipulation referred to in paragraph (a) of the definition will be the "directors' consent" requirement that frequently appears in the articles of closely-held corporations.

The kind of stipulation referred to in paragraph (b) of the definition will frequently be found in a shareholders' agreement.

Securities that are subject to a transfer limitation may be seized but may be required to be disposed of according to a special procedure set out in s. 116, which is designed to accommodate the interests which the transfer limitation was intended to protect.

(2) The definitions in section 42 apply to this Part.

Some terms used in Part 4 are defined in s. 42 of the *Court Order Enforcement Act* and these definitions should also apply.

The relevant definitions are:

"judgment creditor" means a person, whether plaintiff or defendant, who has recovered judgment against another person, and also a person entitled to enforce a judgment;

"judgment debtor" means a person, whether plaintiff or defendant, against whom a judgment has been recovered;

"writ of execution" includes a writ of seizure and sale, sequestration and attachment, and any subsequent writ that may issue for giving effect to it, a warrant, order for seizure and sale or other process of execution sued out of the Supreme Court or Provincial Court having jurisdiction to grant and issue warrants or process of execution.

111. (1) The following securities only are liable to be seized under a writ of execution and disposed of under this Part

(a) a security that is represented by a certificate which is physically located in the Province,

(b) a security that is issued by a local issuer or by an issuer having a transfer agent in the Province and which is not represented by a certificate, or

(c) a security that is under the control of a bailee who is present or carries on business in the Province.

This section sets out the basic rules as to what securities are exigible. Paragraphs (a), (b), and (c) are drafted disjunctively. If any of them is satisfied the security is exigible. In many cases more than one of paragraphs (a), (b), and (c) will be satisfied.

Under paragraph (a), a security is liable to seizure if it is covered by a certificate located in the province. Paragraph (c) would apply where the security is in the control of a bailee who is amenable to the jurisdiction of B.C. courts. An uncertificated security can be seized if it is issued by a local issuer or an issuer with a transfer agent in B.C.

The effect of this subsection is to allow execution against securities located in B.C. or which are in the control of persons who are subject to the process of the B.C. courts. There may be practical impediments which this section cannot address.

One practical impediment may be the lack of appropriate machinery to secure recognition by a foreign jurisdiction whose laws may govern the issuer of the securities. In particular, it may not be possible for the purchaser of a share from the sheriff to be registered in the records of a foreign corporation as a shareholder.

Even where such a practical impediment exists, a seizure in B.C. may still inhibit a transfer of the shares by the judgment debtor. This may aid the creditor in obtaining satisfaction of the judgment through a consensual arrangement.

(2) Subsection (1) does not apply to a security held in an account.

Securities that are held in an account with an investment dealer cannot be seized in the usual way. Instead, the procedure under s. 117 for seizure of an account applies.

(3) Nothing in this Part affects the jurisdiction of the court to appoint a receiver or grant a charging order in respect of securities.

Part 4 is not intended to restrict the court's powers to deal with a security through equitable execution by appointment of a receiver, as that jurisdiction is currently exercised. For an example of a situation in which a judgment creditor might reasonably seek the appointment of a receiver see *National Trust Co.* v. *United Services Funds*, (1986) 2 A.C.W.S. (3d) 79, No. 302:261, [1986] B.C.D. Civ. 3867-04 (S.C.).

The ability to grant a charging order under the *Judgments Acts 1838 and 1840*, 1&2 Vict., c. 110, 3&4 Vict., c. 82 is also preserved.

112. (1) A security

(a) other than a security that is under the control of a bailee or one that forms part of an account, is seized

(i) when the sheriff takes possession of the certificate, or

(ii) if the security is not represented by a certificate, when a notice of seizure in prescribed form and a copy of a writ of execution are served on the issuer or the transfer agent of the issuer,

Seizure of a certificated security is carried out by physically seizing the certificate. This is done in order to prevent transfer of the security to a third party and to facilitate sale by the sheriff and registration in the name of the purchaser in the execution sale.

This is the only permissible method for seizing a security of an issuer that is governed by the *Canada Business Corporations Act* or the *Bank Act*, as those Acts stipulate that no seizure is effective unless the certificate is actually taken into possession.

If the certificate comprises the holdings of persons other than the judgment debtor, those persons may challenge the sheriff's right to take possession of it. The sheriff or the other holders might apply to the court under s. 123(1) for relief or directions.

This method of seizure would not be used if the security is under the control of a bailee.

(b) that is under the control of a bailee is seized when a notice of seizure in prescribed form and a copy of a writ of execution are served on the bailee.

Paragraph (1)(b) provides for seizure of securities, or the judgment debtor's beneficial interest in them, where the securities are controlled by a third person. The bailee could be, for example, a trustee or a secured party to whom the securities have been pledged to secure a loan.

A judgment creditor would not resort to this method where securities are under the control of an investment dealer. The procedure under s. 117 for seizure of an account would be used instead.

(2) Where a security has been seized under paragraphs (1)(a)(i) or (1)(b) and the issuer is a local issuer or is one who has a transfer agent in the Province, the judgment creditor may deliver a notice of seizure in prescribed form to the issuer or the transfer agent.

The policy behind this provision is to ensure, from the earliest possible time, that the judgment debtor will not be able to evade the judgment creditor by transferring the securities to a third party.

Subs. (2) is confined to the case of the seizure of securities issued by a local issuer or an issuer having a transfer agent in B.C. (See the definition of "local issuer" in s. 110.) Delivery of a notice triggers certain prohibitions on the conduct of the corporation (subs. (5)) and a breach of them can result in a sanction (subs. (6)). Restricting these measures to issuers located in British Columbia is intended to ensure that the liability to the sanction is coextensive with the jurisdiction of the British Columbia courts.

"Deliver" is defined in s. 29 of the *Interpretation Act* as follows:

> "deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

(3) Subject to subsection (4) and section 117, from the time of seizure of a security, no transfer of the security by or on behalf of the judgment debtor is valid unless the seizure has previously been discharged.

Subs. (3) prevents the judgment debtor from validly transferring a security after it has been seized. The invalidity of such a transfer is subject to two exceptions. If the transferee gives value for the security and acquires actual possession of the security certificate without knowledge of the seizure, (or the recording of a transfer in the case of an uncertificated security or a sale on the open exchange) the transfer will take effect against the sheriff or a purchaser from the sheriff. (See subs. (4)) A transfer may also be carried out at the sheriff's direction by an investment dealer holding the judgment debtor's account under s. 117(6).

(4) A purchaser of a security has priority over the interest of

(a) the judgment creditor,

(b) the sheriff, or

(c) a purchaser of the security from the sheriff;

if the first-mentioned purchaser

(d) gave value for the security,

(e) acquired the security without knowledge of the seizure or sale by the sheriff; and

(f) in the case of

(i) a security represented by a certificate, took possession of the certificate, or

(ii) a security not represented by a certificate, an entry is made in the records of the issuer, its transfer agent or a clearing agency indicating that the security was transferred to the first-mentioned purchaser or to an agent, investment dealer, nominee or other person acting on behalf of that purchaser.

Subs. (4) will apply only in exceptional cases. A purchaser who acquires possession of a security from the judgment debtor without knowledge of the fact it has been seized may obtain priority under subs. (4) over the judgment creditor or a purchaser in an execution sale. S. 31(3) of the *Personal Property Security Act*, which gives the purchaser of an instrument or security priority over a perfected security interest if the purchaser acquired the instrument or security without knowledge of the security interest, is similar. The position of a purchaser buying in good faith *vis-a-vis* an execution creditor should not be worse than it is *vis-a-vis* a holder of a security interest. Subs. (4), like s. 31(3) of the PPSA, promotes the negotiability of securities, in keeping with commercial practice. As the innocent purchaser must acquire the security certificate or be recorded as the transferee despite a seizure in order for subs. (4) to confer priority, however, the provision will operate only in a very narrow range of circumstances.

(5) Unless the seizure is discharged, no dividend, interest or other benefit shall be issued or paid on a seized security:

(a) by the issuer where the security was seized under subparagraph (1)(a)(ii) or where notice was delivered under subsection (2), unless the dividend, interest or other benefit was declared, announced or accrued prior to the delivery of the notice and not more than 10 days have elapsed since delivery, or

(b) by the bailee where the security was seized under paragraph (1)(b),

except

(c) to the sheriff, if the security has not yet been disposed of by the sheriff,

(d) to the person to whom the security has been disposed of by the sheriff; or

(e) pursuant to an order of the court under section 123(4).

This binds the corporation as to dividends, interest and other payments associated with securities after service or delivery of notice of a seizure. Its function is similar to the current section 59(3) of the *Court Order Enforcement Act.*

See subsection (6) as to the consequences of a payment in violation of this provision.

Paragraph (a) provides a "grace period" of 10 days. Its purpose is to protect the issuer where events have been put in motion to issue dividend or interest cheques to a large number of share- or bondholders. At the time notice is received it may either be impossible, or highly inconvenient, to reverse matters and halt payment to a single holder.

(6) Where a payment or distribution is made contrary to subsection (5), the payor remains liable to pay the sheriff or the person to whom the share has been disposed of by the sheriff.

Self-explanatory.

113. (1) Subject to the rights of a secured party under the *Personal Property Security Act*, where a security is seized under section 112(1)(b), the bailee shall not surrender the security certificate, if any, to anyone other than the sheriff, unless otherwise ordered by the court.

The general rule is that once a security controlled by a bailee has been seized, the bailee must not surrender the security certificate to anyone other than the sheriff. This is to guard against the possibility that a third party may acquire rights in the security against the judgment creditor, the sheriff, or a purchaser from the sheriff. If a secured party (who may be the bailee) has a perfected security interest in the security, however, this rule can be displaced. The point at which a security interest crystallizes against a judgment creditor is a highly technical matter. See the PPSA, s. 20.

(2) Where a security is seized under section 112(1)(b), the sheriff may demand that the bailee surrender possession of the security certificate, if any.

If a security controlled by a bailee is seized, the sheriff may demand that the bailee surrender possession of the security certificate. This is to facilitate the disposition of the security to satisfy the judgment and to guard against the possibility that a third person may acquire rights in the underlying security as against the sheriff or purchaser from the sheriff.

(3) Where a demand is made under subsection (2), the bailee may refuse to comply pending an application under section 123(1) for relief or directions, if the bailee believes that compliance would be inconsistent with the conditions on which the security is held.

Some types of pledges and other third-party interests may be destroyed if possession of a security certificate is relinquished, or the bailee may hold certificates under a trust involving beneficiaries other than the judgment debtor. If surrender of the certificate would be inconsistent with the basis on which the bailee holds the security, the bailee may properly refuse to comply with the sheriff's demand. The bailee must then apply for relief or directions under s. 123(1) in order that the court may determine the validity of the bailee's grounds for withholding the security certificate.

(4) The sheriff may redeem a security that is subject to the rights of a secured party having priority over the writ of execution by paying to the secured party the amount secured at the time of the seizure.

The sheriff may choose to redeem a security from a secured party who has priority over the judgment creditor by paying the amount secured at the time of seizure if the amount secured is small in comparison to the value that could be obtained by selling it free of the secured party's interest. Note that the secured party's position with respect to advances made after the seizure is governed by the *Personal Property Security Act*. (See ss. 14, 20, 35(6) of the PPSA.)

114. Where a security is seized under this Part, the sheriff shall, as soon as practicable after the seizure, serve a notice in prescribed form advising of the fact of the seizure and a copy of the writ of execution on the judgment debtor, but the failure to serve a notice or writ on the judgment debtor under this section does not affect the validity of the seizure.

The judgment debtor should be made aware of the fact of the seizure as soon as practicable.

115. (1) Where a security seized under section 112 is listed for trading by a recognized stock exchange in Canada, the sheriff shall dispose of it through the stock exchange.

Whenever possible, listed securities should be disposed of through a stock exchange. This best ensures that fair market value will be received.

This subsection, and a number of others, adopts the word "dispose," in preference to "sell," "realize," and related terms, to refer to the process whereby a seized security is dealt with so as to satisfy the judgment debt.

"Dispose" is a broader term and its use triggers the definition in section 29 of the *Interpretation Act*:

> "dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

In most cases sale will be the appropriate type of disposition but there may be circumstances where some other course will maximize the recovery.

S. 118 requires that the disposition of a seized security must be "commercially reasonable."

(2) Where a security seized under section 112 cannot be disposed of under subsection (1), the sheriff may dispose of it through auction, tender or a private transaction.

If a security is not listed on a stock exchange, the sheriff should be able to act flexibly in disposing of it. Where concerns arise as to the wisdom of a proposed disposition under this subsection an application for directions may be made under s. 123(1).

(3) For the purpose of a disposition under subsections (1) or (2), the sheriff may engage the services of an investment dealer.

Self-explanatory.

(4) Where an enactment, a statute of Canada, or a regulatory authority restricts, or imposes a condition on, the transfer of a security that has been seized under this Part, the security shall be disposed of

(a) under this section if there is no transfer limitation, and

(b) under section 116 if that section would otherwise apply to the disposition of the security,

only after the restriction or condition imposed by the enactment, statute of Canada or regulatory authority has been removed or satisfied.

This subsection will primarily apply to situations in which trading in particular securities is prohibited by federal or provincial legislation, or by the order of a regulatory authority for a certain period of time after their issuance, or where a general "cease trading" order is in effect with respect to a security for the time being.

"Transfer limitation" is defined.

116. (1) The sheriff shall dispose of a seized security under this section if

(a) the security is subject to a transfer limitation that is contained in an incorporation document;

(b) the security is subject to a transfer limitation that is noted conspicuously on the security certificate, if any, or

(c) the sheriff receives a notice under subsection (2) within 10 days after the seizure.

Section 116 governs the disposition of transfer-limited securities. See the comment to section 115(1) as to the meaning of "dispose."

Most companies in which there is a limitation on the transfer of securities are small companies having a limited number of shareholders. Where the shares in a corporation are closely held, a group of existing shareholders have a legitimate interest in seeing that a stranger is not thrust on them as a business associate. This is the reason for transfer limitations in the first place. S. 116 provides a procedure whereby transfer-limited securities remain exigible but are to be disposed of according to the transfer limitation if it is reasonable to do so.

The sheriff can only be expected to observe a transfer limitation if its existence can be readily determined, however. For this reason a disposition under s. 116 is only required where the transfer limitation is contained in an incorporation document, noted conspicuously on the security certificate, or where the sheriff is informed of the existence of the transfer limitation. Subs. (2) provides for a notice of a transfer limitation to be given to the sheriff.

(2) An issuer, the judgment debtor or a person claiming the right to acquire a seized security under a transfer limitation may give notice to the sheriff in writing within 10 days after the seizure, stating

(a) the nature of the transfer limitation, and

(b) the person or class of persons entitled to acquire the security under the transfer limitation.

Subs. (2) allows the issuer, the judgment debtor, or a person enjoying the benefit of a transfer limitation, to notify the sheriff in writing of the existence of the transfer limitation within 10 days of the seizure. The security is then required to be offered for disposition according to the procedure set out in this section.

(3) The following persons shall, in the order listed, have the first opportunity to acquire a seized security that is subject to a transfer limitation:

(a) persons who have

(i) an option,

(ii) a right of first refusal, or

(iii) a right of pre-emption to purchase the security,

which is unconditionally exerciseable at the time of seizure, or exerciseable upon a condition which the holder of the option or right may unilaterally fulfil,

If Part 4 is to erode the protection offered by transfer limitations, fairness dictates that the existing shareholders or other interested parties should have an early opportunity to purchase the securities from the sheriff at a reasonable price. This is the policy embodied in subs. 116(3).

The first opportunity to purchase the securities is given under paragraph (a) to persons who have the kinds of rights to purchase securities that usually arise under a private shareholders' agreement. The class is restricted to those whose rights of purchase could have been exercised at the time of seizure or could be exerciseable merely upon the doing of some act, such as giving a notice of intention. Others whose rights of purchase are dependent on more remote contingencies would not receive the first opportunity to bid, although they might come within paragraphs (c) and (d). The exposure of securities under this paragraph may be the subject of an application to the court for directions under section 123(1). See also subs. 115(4).

(b) the issuer of the security,

The issuer itself is given the next opportunity to purchase the shares. This would constitute an "indirect" purchase by the existing shareholders. It would both cost and benefit them in proportion to their existing holdings and would provide an equitable resolution if a competition should arise between two or more existing shareholders for the seized shares of another shareholder.

Not every corporation may be legally competent to purchase its own securities. The company law of some jurisdictions may forbid this. The securities may also be of a nature which does not allow the issuer to reacquire them in the same way as a company might repurchase its own shares. A company might choose to redeem a debt obligation, for example, rather than allow it to be held by a purchaser who acquired it at an execution sale. Depending on the terms of the obligation, this may or may not be possible at a given point in time.

(c) the holders of the class of security seized,

(d) the holders of any other class of security of the issuer, if any.

Next in priority are other holders of the securities of the same issuer. This is provided in paragraphs (c) and (d). Holders of the class of security seized are given the first opportunity to purchase.

A tendering procedure for disposition is described in the notes to subs. 116(4).

If no acceptable offer for the securities is made by a person mentioned in this subsection, the securities would be disposed of under s. 115(2) as if there had been no transfer limitation. The mere existence of a transfer limitation is not to be allowed to prevent the sale of the securities in execution.

(4) A disposition under subsection (3) shall be by tender, conducted as provided by regulation.

A tendering process is adopted as the method of disposition because it permits full recognition of the priority structure established in subs. (3). If none of the "insiders" are prepared to make an acceptable bid, the tendering process will not unduly delay a disposition to a non-insider.

The mechanics of the tendering process are left to be dealt with in regulations.

Set out below are the features we would expect to see embodied in the regulations.

The securities would be exposed for sale to the groups of "insiders" described in paragraphs (a) to (d) of subsection (3) for 30 days. During that period any insider, whatever his group, who wishes to bid must submit a tender.

Tenders would be "sealed" but the group to which the bidder belongs would be indicated on the outside of the tender document.

On the expiry of the 30 day period all bids of group (a) (if any) would be opened to see if an acceptable bid was made.

If an acceptable bid was made by a member of group (a) it would be accepted and no further tenders would be examined.

If no acceptable bid was received then the bids of the next lower ranked group would be examined.

The procedure described would be repeated for groups (b) to (d) until an acceptable bid was found.

If no acceptable bid was received from any "insider" then the sheriff would proceed to dispose of the security under subs. 115(2).

The acceptability of a bid would be determined by:

(a) the rights which persons identified in subsection (3)(a) may have to acquire the security at a preset price, and

(b) the requirement in s. 118(1) that the disposition be "commercially reasonable."

(5) For the purposes of a disposition to a person described in subsection (2), the sheriff is not bound by a stipulation as to price or any other term of disposition provided in the transfer limitation but the sheriff shall give effect to such a stipulation if it does not prejudice the judgment creditor and it is not otherwise unreasonable to do so.

The interests reflected by transfer limitations should be protected as long as they do not impede the execution process. The sheriff should not be automatically compelled to accept a tender based on a term of a transfer limitation. A bidder could apply under s. 123(1) for an order requiring the sheriff to abide by the transfer limitation.

(6) Where an offer for a security is accepted under this section, the security shall be disposed of by the sheriff who shall, within 10 days after the disposition, serve on the issuer or the transfer agent of the issuer

(a) a copy of the writ of execution under which the security was seized,

(b) the security certificate, if it is in the sheriff's possession, and

(c) a memorandum from the sheriff certifying the seizure and disposition of the security under this Part and the name of the person to whom it was disposed

and the proper officer of the issuer or transfer agent shall enter the disposition as a transfer, cancellation, or other transaction as the case may be, in the manner provided by law.

This subsection describes the machinery by which the sheriff's disposition of a security is communicated to the issuer or the issuer's transfer agent. It also compels registration of the transfer on the share register of the issuer. Its compulsory effect is, of course, limited to British Columbia.

(7) Where an offer for a security is not accepted under this section, the sheriff may dispose of the security under section 115 as if it were not subject to a transfer limitation.

If no "insider" makes an acceptable offer for the securities, the sheriff should be able to act flexibly in disposing of them.

117. (1) An account of a judgment debtor constitutes property exigible under this section.

Section 117 sets out a special procedure for execution against an account with an investment dealer. The account as a whole is treated as exigible property.

(2) An account of a judgment debtor is seized when a notice of seizure in prescribed form and a copy of a writ of execution are served on the investment dealer who controls the account.

Self-explanatory.

(3) Where an account is seized under subsection (2), the seizure does not prevent a disposition of any security or other item of property held or carried in the account to a transferee for value, but the proceeds of the disposition stand in the place of that security or other property and are subject to the seizure of the account.

To minimize disruption of the normal operation of the securities industry by execution process, the broker controlling a seized account remains able to transfer securities and other property for value in the usual way. This enables a fast disposition of the judgment debtor's securities on the open market, carried out at the sheriff's direction. As long as the proceeds are subject to the seizure, the judgment creditor is protected.

(4) Where an account is seized under subsection (2), the investment dealer shall not, except as permitted by the court,

(a) make any payment to the judgment debtor in relation to the account,

(b) permit the judgment debtor to withdraw or take possession of any securities, security certificates, money or other property from the account,

(c) subject to subsection (5), accept or act on any order from the judgment debtor in relation to the account, given after the seizure,

unless the seizure is first discharged by payment to the sheriff under subsection (7) or by an order of the court under section 123(4).

This subsection places the account out of reach of the judgment debtor while the seizure is in effect, and prevents the investment dealer from making any payment to the judgment debtor or acting on the judgment debtor's order.

(5) An investment dealer may, following the seizure of an account under this section, take any step in relation to the management of the account and exercise rights or powers with respect to the account which could have been exercised if there had been no seizure, unless the taking of that step or the exercise of rights or powers would constitute a violation of subsection (4) or interfere with a realization under subsection (6).

Some of the contractual powers which investment dealers commonly exercise in order to respond to market conditions and prevent losses do not depend on the judgment debtor's contemporaneous consent, such as the power to sell in a declining market to prevent an account from becoming undermargined. Investment dealers should continue to be able to exercise administrative powers over the account stemming from contracts with their client while the client's account is under seizure, except where these would interfere with the execution process.

Subs. (5) would allow an investment dealer to act on a standing "stop loss" order made prior to the seizure. As well as preventing loss to the account and to the investment dealer, it might be in the interest of the judgment creditor for the investment dealer to be able to sell securities under seizure quickly when their price appears to be falling. If necessary, a margin call could be made on a judgment debtor while the account is under seizure. If the judgment debtor did not comply with the margin call, the investment dealer would still be able to sell the securities affected, withholding in accordance with the seizure any proceeds otherwise payable to the credit of the judgment debtor.

(6) The sheriff may direct the investment dealer to recover from the account the amounts to be raised under the writ of execution, and the investment dealer shall, subject to the right to apply for relief or directions under section 123(1),

(a) dispose of sufficient securities or other property held in the account; or

(b) segregate sufficient monies from those standing to the credit of the judgment debtor in the account

in order to recover those amounts, or so much of them as it is possible to recover.

Amounts set out in the writ of execution are to be raised through sale on the open market by the investment dealer controlling the account, without the need for actual transfer of the individual securities in the account in whole or in part to the sheriff. This would likely avoid the adverse effects on value which usually result in a sheriff's sale.

There may be situations in which it would be disadvantageous to market a large volume of securities at once. If the investment dealer objects to immediate sale on the ground that it would not be commercially reasonable, an application can be made to the court for directions under s. 123(1).

(7) An investment dealer who recovers amounts from an account under subsection (6) shall, subject to subsection (8) and to the rights of a secured party having priority over the writ of execution with respect to the proceeds of the securities or other property, or in the monies segregated, pay the amounts to the sheriff.

(8) An investment dealer who disposes of securities or other property under subsection (6) is entitled to an amount equivalent to the usual commission which would have been obtained in a similar disposition ordered by the judgment debtor.

Self-explanatory.

(9) For the purpose of complying with a direction by the sheriff under subsection (6), an investment dealer is not bound by a stipulation in a bylaw, rule or agreement to hold for safekeeping or to segregate securities or other property for the judgment debtor.

Sometimes an investment dealer may hold securities for a client for safekeeping only. Exchange or association rules may also require the segregation of securities for which the client has paid in full. This subsection relieves the investment dealer of that duty for the purpose of realizing amounts to be recovered under a writ of execution.

(10) An investment dealer is not liable to any person in respect of a decision taken or anything done in good faith and with reasonable care and skill pursuant to a direction of the sheriff under subsection (6), including, without limitation, a decision or act in relation to

(a) the time, manner or place at or in which any portion of an account is disposed of,

(b) the selection of any portion of an account for disposition to fulfil the direction of the sheriff,

(c) the acceptance or rejection of an offer to purchase any portion of an account, or

(d) the exercise or non-exercise of the right to apply for relief or directions under section 123(1).

Self-explanatory.

118. (1) No security or account shall be disposed of under this Part unless the disposition is commercially reasonable.

The requirement that a disposition be "commercially reasonable" is one found in most modern personal property security legislation in reference to the exercise of remedies on default. The requirement is binding on the sheriff and a bailee acting under section 117(6).

(2) The requirement of commercial reasonableness under subsection (1) extends to every aspect of the disposition, including, without limitation, the manner, time, place and terms of the disposition.

Self-explanatory.

(3) In the absence of evidence to the contrary, a disposition of a security under this Part which takes place on a recognized stock exchange is presumed to be commercially reasonable.

Self-explanatory.

(4) A disposition of a security under this Part which has been approved by the court is deemed to be commercially reasonable.

Self-explanatory.

119. Where a security represented by a certificate which may be disposed of under this Part is not in bearer form or has not been endorsed for transfer by the person named on the certificate, the sheriff may endorse it for transfer and the sheriff's endorsement has the same effect as if made by the person named on the certificate.

This provision is analogous to a statutory power of attorney permitting the sheriff to endorse shares for transfer.

120. Except as otherwise provided by section 112(4) or by any other enactment or rule of law, a person who acquires a security as the result of a disposition under sections 115, 116 or 117 acquires the security subject to any right, interest or obligation to which it was subject immediately prior to the disposition.

Only the actual interest of the judgment debtor can be sold by the sheriff. Thus, anyone who purchases property in an execution sale acquires that property subject to all other rights and interests which were in effect before the sale. This general rule is displaced by s. 112(4) when someone else has obtained the security certificate, or when a transfer to someone else has been recorded by a clearing agency. It is also displaced in some situations by the *Personal Property Security Act* if a secured party has failed to perfect a security interest in the property. This section is intended to preserve the status quo insofar as priorities are concerned.

121. A judgment creditor or sheriff who believes that an attempt may take place to transfer or deal with a security or account which has been seized in order to defeat, delay or prejudice the judgment creditor may apply to the court under section 123(1) for an order directed to the judgment debtor or any other person restraining the transfer or other dealing with the security or account.

S. 121 provides an expedient remedy to prevent transactions intended to defeat the execution process.

122. (1) The sheriff is entitled to indemnity from a judgment creditor in respect of any claim or liability arising from the seizure and disposition of a security or account under a writ of execution delivered by that judgment creditor, if the sheriff has exercised good faith and reasonable care and skill in carrying out the seizure or disposition.

(2) On an application by the sheriff or the judgment creditor made before or after the seizure, the court may make an order fixing the terms of the indemnity under subsection (1).

Self-explanatory.

(3) On an application under subsection (2), the court may order that the judgment creditor enter into an indemnity bond for an amount it considers appropriate as a precondition to a seizure or disposition of a security or account.

(4) The indemnity under subsection (1) does not prevent the sheriff from applying under section 123(1) for relief or directions, or for interpleader relief.

123. (1) If any question arises under this Part concerning

- (a) the validity of a seizure,
- (b) whether an item of property is a security,
- (c) the value of a security,
- (d) whether a proposed disposition of a security or an account is commercially reasonable,
- (e) entitlement to a security, or an account, or to the proceeds of its disposition,
- (f) the application of section 116 to the disposition of a security,
- (g) whether a person is a bailee for the purposes of this Part,
- (h) whether a demand made on a bailee or a direction of the sheriff is one for which compliance may properly be refused,
- (i) whether a seizure ought to be discharged,
- (j) whether a person should be restrained from transferring or otherwise dealing with a seized security or account, or
- (k) any other matter respecting the seizure or disposition of a security or an account,

a sheriff, judgment creditor, judgment debtor, issuer, an officer or shareholder of the issuer, bailee, investment dealer or any other person claiming an interest in a security or an account may apply to the court for relief or directions.

A court may give directions or grant relief on a variety of issues that may arise under Part 4.

Applications will frequently be made in relation to valuation questions. The sale of securities in closely-held companies will often raise difficult issues of valuation given the narrow market for them and the many factors affecting value which may be peculiar to the issuer.

An application may be made to the court for directions on any matter respecting the seizure or disposition of a security. Most parties with a stake in the matter have standing to apply. The sheriff or judgment creditor, for example, might wish to apply for directions where there is some dispute as to whether or not an offer is unreasonably low and ought to be rejected.

The judgment debtor may wish to apply where there is apprehension that a highly prejudicial sale is about to occur.

Other shareholders may apply if a competition for the shares arises.

Applications will frequently be made by bailees to determine if refusal of a demand by the sheriff to surrender a security is proper in the circumstances.

(2) A person who applies under subsection (1) shall give notice of the application in the manner prescribed by the Rules of Court to the sheriff, the judgment creditor, and the judgment debtor.

This provides the minimum requirement in all cases for notice of an application under subs. (1). Depending on the circumstances, other persons may well have to be given notice, but it is difficult to widen the minimum requirement for notice without running the risk of making it much more onerous than is necessary in many instances. Other shareholders, for example, may be vitally concerned if the issuer is a small private company. This would not likely be so if the securities were publicly listed.

Subs. (2) is drafted so that either the procedure by petition or notice of motion could be used, as may be appropriate.

(3) The court may make an order under subsection (4) whether or not all persons having an interest in a security or an account to which the order relates or whose interests may be affected by the order have been given notice of the application.

The purpose of subs. (3) is to ensure that the court is not hampered by an inability to act if not every person who conceivably may be affected has been served. For example, an issuer may be "affected" by an order if it may ultimately have to record as the owner of the shares a purchaser in a sale for which the court's approval is being sought, but might be so remotely situated from the matter in dispute that the application is of no concern.

(4) Where an application is made under subsection (1) the court may, without limitation, grant or make

Self-explanatory.

(a) an order concerning the validity of a seizure,

(b) a declaration as to whether any property is a security,

(c) a determination as to the value of a security, and may set a reserve or minimum price for the purpose of a disposition of a security or an account,

(d) any order for the disposition of a security or an account that is appropriate in all the circumstances,

(e) a declaration respecting entitlement to a security or an account or to the proceeds of its disposition, including a declaration as to priority among competing claimants,

(f) a declaration as to the rights and obligations of a bailee or secured party,

(g) an order that a local issuer or its officers provide information concerning the worth of that issuer and its securities,

(h) an order shortening or lengthening the prescribed time for submitting a tender under section 116(4), whether or not the time has elapsed,

(i) an order that a transfer limitation is binding on the sheriff,

(j) an order staying an action against the sheriff,

(k) an order allowing costs and expenses of a person to be recovered out of the proceeds of disposition of a security or an account, or otherwise,

(l) an order for the transfer of a security out of an account to the sheriff for disposition under sections 115 or 116,

(m) an order restraining a person from transferring or otherwise dealing with a seized security,

(n) an order discharging the seizure, on such terms as the court finds appropriate to impose,

(o) an order that an issuer formed under the laws of the Province be liquidated and the proceeds of its liquidation be distributed according to law,

(p) an order giving other relief or directions as may be appropriate.

(5) Subject to subsection (6), a direction or order under this section may be given or made by the court which issued the writ of execution.

Generally, an application for directions would be made to the court in which the judgment was taken. This would be the same court that issued the writ of execution and might be the Supreme Court or Provincial Court (Small Claims).

(6) No direction or order shall be given or made under paragraph (4)(o) except by the Supreme Court.

Liquidation should be ordered only by the Supreme Court, as it is the court having jurisdiction over company law matters under the *Company Act* and the *Canada Business Corporations Act*.

(d) adding a new Part 5 as follows:

Part 5

Regulations

124. The Lieutenant Governor in Council may make regulations, including regulations

A power to make regulations will have to be inserted into the *Court Order Enforcement Act*.

(a) prescribing the form of a notice required to be served under Part 4,

(b) respecting the procedure for conducting a disposition of seized securities under section 116(4).

CHAPTER V CONCLUSION

A. General

As our formal recommendations are expressed in the form of the draft legislation, it is unnecessary to repeat them in detail. A brief restatement of major features of this Report sufficiently describes the case for reform.

The provisions of the *Court Order Enforcement Act* relating to execution against shares are very archaic. Conflicting interpretations and attempts to apply them to modern circumstances have produced confusion.

The present sections speak only of "shares," yet many more species of rights and interests are traded in the securities market today besides the classic equity share. The ability of judgment creditors to reach these newer forms of securities should be put beyond question, and better procedures developed to facilitate execution against securities generally.

The improvement of execution procedures should be carried out with due regard for other interests worthy of protection, however. The interests of secured parties must be taken into account. So should the interests of shareholders in the issuing corporation. The closely-held private corporation has proven to be a useful form of economic organization. It depends upon stability within the owning group. In the event of a judgment against one shareholder, the other shareholders should have the first opportunity to acquire the judgment debtor's holdings in an execution sale in order to preserve continuity of ownership and direction, provided that proper value is received for the assets.

Enforcement of a judgment should not disrupt the operation of the securities market any more than is absolutely necessary. Where the judgment debtor has an account with an investment dealer, a procedure akin to garnishment can be employed to allow recovery under the judgment without removing securities from the fungible mass upon which the market depends.

A review of many aspects of debtor-creditor law must now be made in light of the *Personal Property Security Act*. In this Report, we have attempted to bring one branch of the law in this area, long overdue for reform, into harmony with that statute.

The law of execution has always lagged behind developments in other areas of commercial law and civil procedure. This tendency towards obsolescence, coupled with the growth of secured credit, has not made the lot of the judgment creditor a happy one. It is our belief that the reforms proposed in this Report will go some distance in redressing the balance in favour of the unsecured creditor.

B. Acknowledgments

We wish to thank all those who took the time to consider the Working Paper which preceded this Report. Their comments were often detailed and extensive. They were of great assistance to the Commission.

We also wish to thank Professor Elizabeth Edinger of the Faculty of Law, University of British Columbia, who prepared a research paper for the Commission on execution against shares. It served as the groundwork for both the Working Paper and this Report. The Commission, however, bears responsibility for the conclusions reached in the Report.

Several officials and legal advisers of the Vancouver Stock Exchange, West Canada Depository Trust Company, and the British Columbia Securities Commission took time to consult with representatives of the Commission. Their advice and assistance is gratefully acknowledged.

We also acknowledge the contribution of Gregory G. Blue, Legal Research Officer, who undertook research and, subject to the direction of the Commission, prepared this Report.

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APPENDIX

COURT ORDER ENFORCEMENT ACT, R.S.B.C. 1979, c. 75

Selected Provisions

Effect of writ of execution against goods

49. Except as exempted by sections 64 to 72 or otherwise provided by this Act, all goods, chattels and effects of a judgment debtor are liable to seizure and sale under a writ of execution against goods and chattels.

Sheriff empowered to seize money and securities for money

52. Any sheriff or other officer to whom any writ of execution is directed shall seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, belonging to the execution debtor, and may and shall pay and deliver to the execution creditor any money or bank notes which are seized, or a sufficient part of it; and shall hold any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money as security for the amount by the writ of execution directed to be levied, or as much of it as has not been otherwise levied and raised; and the sheriff or other officer may sue in his own name for the recovery of the sums secured by it, if and when the time of payment of it has arrived.

Sheriff to satisfy writ of execution and pay surplus to execution debtor

54. The sheriff or other officer shall pay over to the execution creditor the money recovered, or a part of it as is sufficient to discharge the amount by the writ of execution directed to be levied; and if, after satisfaction of the amount directed to be levied, together with sheriff's fees, poundage and expenses, and surplus remains in the hands of the sheriff or other officer, it shall be paid to the execution debtor.

Sale of equity of redemption in goods

56. Under a writ of execution against goods the sheriff, or other officer to whom it is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the execution debtor, and the sale shall convey whatever interest the execution debtor had in the goods and chattels at the time of the seizure.

Deemed to be incorporated companies

57. All corporations established for trade or profit, or for the construction of any work, or for the acquisition of gain, shall be deemed incorporated companies for sections 58 to 63, inclusive, although they are not called companies in the Act or charter incorporating them, or in their memorandum or articles of association.

Shares made liable to seizure

58. All stock, shares and dividends of shareholders in an incorporated company in the Province, having transferable joint stock or shares, shall be held to be personal property, and are liable to bona fide creditors for debts, and may be attached, seized and sold under writs of execution in a similar manner as other personal property.

Seizure and sale of shares

59. (1) The sheriff to whom a writ of execution is addressed, on being informed on behalf of the plaintiff that the defendant has stock or shares, and on being required to seize them, shall at once serve a copy of the writ of execution on the incorporated company with a notice that all the stock or shares which the defendant has in the capital stock of the company are seized accordingly.

(2) From the time of service no transfer of the stock or shares by the defendant shall be valid, unless the seizure has been discharged.

(3) Every seizure and sale made under it shall include all dividends, premiums, bonuses or other pecuniary profits on the stock or shares seized, and they shall not, after notice, be paid by the company to anyone except the person to whom the stock or shares have been sold by the sheriff, unless the seizure is discharged, on penalty of paying it twice.

Effect of notice of seizure where company has more than one place for service of process

60. If the incorporated company has more than one place where service of process may be made on it, and there is some place where transfers of stock or shares may be notified to and entered by the company so as to be valid as regards the company, or where the dividends or profits on the stock or shares may be paid other than the place where service of the notice has been made, the notice does not affect any transfer or payment of dividends or profits duly made and entered at any other place, so as to subject the company to pay twice, or to affect the rights of a bona fide purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to the other place, which notice it is the duty of the company to transmit by post.

Shares to be personal property at place where notice of seizure served

61. The stock or shares in the capital stock shall be held to be personal property, found by the sheriff in the place where notice of the seizure of them is served.

Mode of proceeding to complete sale and transfer

62. Where any stock or share is sold under a writ of execution, the sheriff by whom the writ has been executed shall, within 10 days after sale, serve on the incorporated company, at some place where service of process may be made, an attested copy of the writ of execution, with his certificate endorsed on it, certifying the name of the purchaser, who is after that the holder of the stock or share, and has the same rights and is under the same obligations as if he had duly purchased the stock or share from the proprietor of it; and the proper officer of the company shall enter the sale as a transfer in the manner provided by law.

Saving of all other remedies

63. Nothing in this Part shall impair the remedy which the plantiff might, without this Part, have had against any stock or shares in the capital stock, by charging order, attachment or otherwise, and sections 59 to 60, inclusive, apply to the remedy inso far as they can be applied to it.